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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-764

EDWARD BARRY, NATALE CALE, JOHN CATALANO, EDWARD FINN, HARRY SALVESEN, STEVE SENO and WILLIAM SWALLOW,

Petitioners,

VS.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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PRAYER

The petitioners, Edward Barry, Natale Cale, John Catalano, Edward Finn, Harry Salvesen, Steve Seno and William Swallow, respectfully pray that a Writ of Certiorari issue to review the judgment and order of the United States Court of Appeals for the Seventh Circuit in this proceeding entered on October 23, 1974.

OPINION BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit, not yet reported, affirming the judgment of conviction below, is attached hereto and appears in Appendix "A".

STATEMENT OF JURISDICTION

The petitioners, Edward Barry, Natale Cale, John Catalano, Edward Finn, Harry Salvesen, Steve Seno and William Swallow, appealed their convictions in the United States District Court for the Northern District of Illinois to the United States Court of Appeals for the Seventh Circuit. On October 23, 1974, the United States Court of Appeals for the Seventh Circuit affirmed the judgment of conviction. A timely Petition for Rehearing was denied on November 21, 1974. (Appendix "B"). This timely Petition for Certiorari was filed within 30 days of the denial of the Petition for Rehearing. This Court's jurisdiction is invoked under 28 U.S.C., Section 1254(1).

QUESTIONS PRESENTED

1. Whether the Government's use of grand jury subpoenas as an adjunct to post-indictment preparation of the case for trial constituted an impermissible misuse of the grand jury and its processes.

2. Whether all distinction between the common law crimes of bribery and extortion is extinguished when public officials are charged with extortion under color of official right pursuant to 18 U.S.C. 1951.

3. Whether the suppression of pretrial immunity orders for prospective trial witnesses made under the name and number of the then pending indictment was so prejudicial as to deny the defendants their Sixth Amendment right to the effective assistance of counsel.

4. Whether the admission of extensive and particularized evidence of a separate conspiracy, unconnected with the conspiracy charged purportedly to prove motive and intent as to two of the defendants was so inflammatory and prejudicial as to amount to a denial of a fair trial.

CONSTITUTIONAL PROVISIONS INVOLVED

1. The Sixth Amendment to the Constitution of the United States provides as follows:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and District wherein the crime shall have been committed, which District shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense."

STATUTORY PROVISIONS INVOLVED

Title 18, Section 1951, U.S.C. states:

> Interference with commerce by threats or violence
>
> (a) Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be fined not more than $10,000 or imprisoned not more than twenty years, or both.
>
> (b) As used in this section—
>
> (1) The term "robbery" means the unlawful taking or obtaining of personal property from the person or in the presence of another, against his will, by means of actual or threatened force, or violence, or fear of injury, immediate or future, to his person or property, or property in his custody or possession, or the person or property of a relative or member of his family or of anyone in his company at the time of the taking or obtaining.
>
> (2) The term "extortion" means the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right.
>
> (3) The term "commerce" means commerce within the District of Columbia, or any Territory or Possession of the United States; all commerce between any point in a State, Territory, Possession, or the District of Columbia and any point outside thereof; all commerce between points within the same

State through any place outside such State; and all other commerce over which the United States has jurisdiction.

(c) This section shall not be construed to repeal, modify or affect section 17 of Title 15, sections 52, 101-115, 151-166 of Title 29 or sections 151-188 of Title 45.

Title 18, Section 1623, U.S.C. states:

False declarations before grand jury or court.

(a) Whoever under oath in any proceeding before or ancillary to any court or grand jury of the United States knowingly makes any false material declaration or makes or uses any other information, including any book, paper, document, record, recording, or other material, knowing the same to contain any false material declaration, shall be fined not more than $10,000 or imprisoned not more than five years, or both.

(b) This section is applicable whether the conduct occurred within or without the United States.

(c) An indictment or information for violation of this section alleging that, in any proceedings before or ancillary to any court or grand jury of the United States, the defendant under oath has knowingly made two or more declarations, which are inconsistent to the degree that one of them is necessarily false, need not specify which declaration is false if—

(1) each declaration was material to the point in question, and

(2) each declaration was made within the period of the statute of limitations for the offense charged under this section.

In any prosecution under this section, the falsity of a declaration set forth in the indictment or infor-

mation shall be established sufficient for conviction by proof that the defendant while under oath made irreconcilably contradictory declarations material to the point in question in any proceeding before or ancillary to any court or grand jury. It shall be a defense to an indictment or information made pursuant to the first sentence of this subsection that the defendant at the time he made each declaration believed the declaration was true.

(d) Where, in the same continuous court or grand jury proceeding in which a declaration is made, the person making the declaration admits such declaration to be false, such admission shall bar prosecution under this section if, at the time the admission is made, the declaration has not substantially affected the proceeding, or it has not become manifest that such falsity has been or will be exposed.

(e) Proof beyond a reasonable doubt under this section is sufficient for conviction. It shall not be necessary that such proof be made by any particular number of witnesses or by documentary or other type of evidence.

STATEMENT OF THE CASE

The Petitioner, William D. Swallow, was charged in Counts I and XII of a sixteen-count Indictment. The petitioners, Edward Barry, Natale Cale, John Catalano, Edward Finn, Harry Salvesen and Steve L. Seno, were charged only in Count I of the Indictment. Swallow was found guilty of conspiracy to obstruct, delay and affect commerce by extortion (Count I); and of knowingly making a false material declaration to the grand jury (Count XII). Barry, Cale, Catalano, Finn, Salvesen, and Seno were convicted only on Count I, conspiracy to obstruct, delay and affect commerce by extortion under color of official right.

Trial was by a jury. Upon a verdict of guilty on the aforementioned counts, judgments of convictions were entered. Edward Barry was sentenced to the custody of the Attorney General for a period of four years. Natale Cale was sentenced to the custody of the Attorney General for a period of eighteen months. John Catalano was sentenced to the custody of the Attorney General for a period of two years under the provisions of Title 18, Section 4208(a). Edward Finn was sentenced to the custody of the Attorney General for a period of two years. Harry Salvesen was sentenced to the custody of the Attorney General for a period of two years. Steve L. Seno was sentenced to the custody of the Attorney General for a period of two years under the provisions of Title 18, Section 4208(a). William Swallow was sentenced to the custody of the Attorney General for a period of eighteen months on Count I, and a period of one year on Count XII, both sentences to run concurrently.

It is from these judgments and sentences that petitioners appealed.

All of the petitioners were at one time or another, assigned to the Vice Squad of the Eighteenth Chicago Police District, which is located on the near north side of Chicago and encompasses a large number of nightclubs and bars. During the relevant period, the Squad was composed of approximately fifteen officers, divided between the day and night shifts. All the officers were patrolmen except the vice coordinator who was a sergeant. He was in charge of the entire squad; and was in turn directly responsible to the District Commander. The duties of the vice officers included responsibility for enforcement of the liquor laws in the district.

The crux of the Government's case consisted of the testimony of seven former members of the vice squad in the Eighteenth District. Of the seven, five testified under immunity granted pursuant to 18 U.S.C. 6002. All testified concerning monthly collection of money from certain bars and taverns and distribution of that money to members among the vice squad. Payment of a monthly sum entitled a bar to membership in the "club" or the "vice club". The money collected each month was called the "package" or "vice package".

With the exception of Edward Barry, who was a sergeant and vice coordinator from approximately April, 1967 until August, 1970, all of these petitioners were patrolmen assigned to the Eighteenth District vice squad during various portions of the relevant period charged in the Indictment. The monthly collection and distribution had been going on more or less consistently since approximately 1961.

When Captain Braasch became the District Commander, members of the vice squad approached the then vice coordinator and explored the possibility of collecting the "package". The coordinator met with Commander Braasch. It was agreed that the vice coordinator and the men could reinstitute the "club", but that Braasch and he would accept no share. However, Braasch instructed him to obtain a list of bars that the vice men planned to collect from so that they could be reviewed.

Subsequently, the coordinator told the vice officers to prepare a list of club members which they did. He then showed Braasch the list and it was approved. But he was then warned to prepare a list each month reflecting the bars from which the vice men had collected.

In November, 1966 the vice men began collecting money on a monthly basis from a large number of bars located within the Eighteenth District. Officers Cello and Rifkin were primarily responsible for collection on the day-shift. Officers Mascolino and Napier were primarily responsible for doing so on the night-shift.

Most bars were required to pay $100 a month for membership in the "club". In return, they were to be free from "harrassment". That is, from arrest, and from any other activities by the vice squad. They would have a "friend at the station" should they ever require assistance in any difficulties with other officers not members of the vice squad.

In late 1966 or early 1967 several members of the vice squad held a meeting in the police station to discuss the "club". At that meeting the vice officers discussed the procedure for protecting the bars that were in the "club". They also discussed the amount that would be collected

as more bars sought to join. They reiterated that members of the "club" would not be subject to usual enforcement of liquor laws.

As the monthly collections were made by Cello, Rifkin, Mascolino and Napier, the list of bars and amount collected from each was prepared. Each month the list was given to the vice coordinator for review by the Commander. From about November, 1966 until March, 1967 the coordinator took the monthly list to the Commander. He would then examine it and, on occasion, cross off names of bars from which he did not want monies collected. When Sergeant Barry took over as vice coordinator, he assumed that monthly duty.

The money collected was in turn distributed among members of the vice squad monthly. The collectors usually kept $300 or $500 each for themselves, and turned over $150 to $250 to each of the other members of the vice squad as his share of the "package". This arrangement continued until approximately August, 1970, after which all of the money collected was given to the vice coordinator directly. He assumed the monthly responsibility of distributing the "packages".

During trial, forty-eight owners or employees of liquor establishments from which money had been collected testified they had made regular monthly payments. These payments had ranged from $100 to $150, and had been made to members of the Eighteenth District Vice Squad. The "club" members testified that the payments were made to avoid "harassment". That is to say, they were made so as to avoid arrest, spot-checks of licenses, spot-checks of identification for underage drinking, and other acts enforcing the liquor laws. The bar owners and operators testified that they were afraid they might lose business or possibly lose their liquor licenses if the payments were not made.

REASONS FOR GRANTING THE WRIT

1. THE GOVERNMENT ABUSED THE GRAND JURY PROCESS WHEN IT EMPLOYED THAT TRIBUNAL TO ASSIST IN THE PREPARATION OF AN ALREADY INDICTED CASE FOR TRIAL.

The record below discloses that after the return of the Indictment, the Government subpoenaed several tavern owners and operators in the Eighteenth Police District to appear before a grand jury. Each of the witnesses was asked one or two general questions; and, upon asserting his Fifth Amendment privilege, was excused by the foreman with the admonition that he would be notified if and when his attendance would again be required.

In fact, each of the witnesses was later notified by either an Assistant United States Attorney or a special agent of the Federal Bureau of Investigation to appear in the federal building. However, none of those witnesses were placed again before the grand jury, but rather were taken before a federal judge and granted immunity. Although the order purported to grant immunity for testimony at the trial, the witnesses were nevertheless appearing pursuant to an original grand jury subpoena. For that matter, they were served with trial subpoenas either contemporaneous with, or subsequent to the grant of immunity. None of the trial witnesses ever again appeared before a federal grand jury after having been granted immunity.

We urged, both at trial and in the Court of Appeals, that this course of action constituted a grave misuse of the grand jury by the Government. We claimed that the

"sole or principal purpose" for calling those individuals before the grand jury was to assist in the procuring of witnesses and otherwise in preparing the already indicted case for trial. *Beverly* v. *United States*, 468 F. 2d 732, 743 (5th Cir., 1972); *in re Russo*, 448 F. 2d 369, 374 (9th Cir., 1971).

The Government, on the other hand, has argued with persuasive eloquence that there was no misuse of the grand jury because:

1. None of those witnesses who testified at the trial of the cause testified before the grand jury after his grant of immunity. Consequently, the Government could not have utilized the grand jury as a post indictment preparation device;[1] and

2. There was no connection between this case and the post indictment appearances inasmuch as the grand jury was still conducting further investigations into police corruption in the Eighteenth District totally apart from the subject of the Indictment.

In its opinion the Court of Appeals for the Seventh Circuit recognized the usual impropriety of calling prospective witnesses before a grand jury for the purpose of preparing an already pending indictment for trial. The Court nevertheless concluded that the Government interrogated all of the witnesses on subjects relevant to a continuing grand jury investigation and only incidentally, if at all, on subjects relating to the then pending indictment.

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1. We never suggested that the grand jury was used only for discovery. The thrust of our complaint is that it was used as means of coercing attendance and testimony.

(Appendix "A", page 14). In deciding this, it is respectfully submitted, the Court must have totally ignored the evidence.

The record demonstrates beyond peradventure that the trial witnesses were called before the grand jury after indictment not, as the Government has claimed, in an ongoing investigation of police corruption in the Eighteenth District. Rather were they called solely, or at least predominantly for the purpose of employing the grand jury coercive power to lay a basis for subsequent trial immunity and testimony. In this regard, the testimony of Robert J. Chartier is typical and illustrative.

Mr. Chartier had been the manager of a tavern in the Eighteenth District. (Tr., 502).[2] On December 22, 1972, he was interviewed by the FBI and gave a statement. (Tr., 504). Well after the return of the Indictment, Mr. Chartier was subpoenaed to appear before a federal grand jury. (Tr., 505). He was asked only one question: "Mr. Chartier, from 1965 until today, have to ever paid any Chicago police officer any money?" To that question, the witness asserted his Fifth Amendment privilege. (Tr., 506). Two months later he appeared, *without further subpoena*, and pursuant to a telephone call, before a federal judge and was granted immunity. (Tr., 506).

Later the witness appeared at the office of the United States Attorney and gave a further statement to the FBI. (Tr., 508). He testified at the trial that he would not have given that statement had he not been previously

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2. References are to pages in the trial transcript. No Abstract or Appendix was prepared on appeal to the Seventh Circuit Court of Appeals.

granted immunity. (Tr., 509). Furthermore, he never again appeared before a federal grand jury to testify concerning police corruption in the Eighteenth Police District, or for any other reason whatsoever up to and including the time he testified at trial. (Tr., 508).

It is virtually impossible to conceive that the Government would contend seriously that there was no connection between the pending indictment and the grand jury appearances of almost every one of the trial witnesses. One is compelled to wonder why, after immunity was granted, was not a single witness ever again required to appear before the grand jury and give testimony; if the true purpose for calling the tavern owners was, as contended, a continuing investigation. The question answers itself. The Government never really contemplated grand jury testimony from those witnesses. The subpoena was used only as a vehicle to secure attendance of prospective witnesses when they were required by the Government; to coerce those witnesses into asserting their Fifth Amendment privilege under oath; and thereby to establish the grounds necessary for a subsequent grant of trial immunity. That simply is not, and cannot be a function of a grand jury in our society. Its utilization for that purpose by the Government constituted a blatant misuse of the grand jury necessitating suppression of evidence gained thereby.

The Constitution as adopted made no mention of the grand jury. It is in the Bill of Rights that we find the only reference to that tribunal. The framers, then, accepted as fundamental the existence and the nature of the grand jury as a defender of the liberty of the people.

Originally it was designed only to aid the Government and public officials in detecting and punishing crimes.

Tyranical kings from time to time even tried to turn it into an instrument to defeat popular government. By 1789, though, it had evolved at common law into a legal bastion standing between the Government, on the one hand, and the rights of the people on the other.

From the very inception of our nation it was intended to be under the supervision only, and not the control of the Judicial branch of Government. As a matter of fact, in cases of felony, the Fifth Amendment withholds federal judicial jurisdiction over a citizen's liberty until it is conferred by the voting of a true bill. Likewise, it was never the intention of the framers that the grand jury should regress so as again to serve as an arm of either the Executive or the Legislative Branch.

The grand jury is traditionally somewhat in the nature of a fourth, relatively independent branch of government. Though still accusatory, and even at times inquisitorial, it nevertheless still serves as a bulwark against unwarranted intrusion upon constitutional privileges and rights. It exists historically and happily for the protection of the individual against governmental action, and *never* as a tool for prosecutors. Indeed, the very concept of a prosecutor, unanswerable directly to the people, employing with impunity this secret inquisitorial body as an aid and adjunct to his prosecutorial activities must necessarily disturb the response of all who would remain free men. That is why any deliberate or inadvertent misuse of the grand jury process, striking as it does at the very soul of our constitutional form of government, necessitates immediate, drastic and permanent remedial action by this Court.

The Court of Appeals assumed that the defendants were not prejudiced; and, in so doing, also erred. Had the evi-

dence resulting from grand jury misuse been suppressed, a great portion of the testimony against these petitioners would have been affected. In any event, an infringement of basic rights so strikes at the core of our constitutional system as to be prejudicial in itself.

2. THERE WAS A FATAL VARIANCE BETWEEN COUNT I OF THE INDICTMENT, WHICH CHARGED EXTORTION UNDER COLOR OF OFFICIAL RIGHT, AND THE PROOF, WHICH ESTABLISHED, AT BEST, EXTORTION BY THREATS OF ECONOMIC HARM.

The Court of Appeals for the Seventh Circuit held that once the motivation for payments focuses upon the recipient's office, the conduct immediately constitutes extortion under color of official right. It follows that if the recipient is a public official, it is of no moment whatever whether he took the payments to perform his duties, not to perform his duties, or even for a purpose totally unrelated to his duties. (Appendix "A", page A-24). For all practical purposes, then, the Court erased all distinction between the common law crimes of bribery and extortion where public officials are involved. It is respectfully submitted that the Hobbs Act[3] never intended so radically to alter long established and accepted legal principles.

The Indictment charged only extortion under color of official right.[4] The evidence, though, demonstrated that the payers of the monies were motivated by a desire to pre-

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3. Title 18, Section 1951, U S.C.

4. The grand jury could have charged both types of extortion; but limited the indictment to color of official right.

vent the police from performing their legitimate duties, rather than to insure performance of those duties. As a necessary result, unless bribery is now totally included in the definition of extortion within the framework of the Hobbs Act, there was clearly a fatal variance between the Indictment and the proof. *Stirone* v. *United States,* 361 U.S. 212; *Ex parte Bain,* 121 U.S. 1, 10.

It has long been a fundamental rule of federal jurisprudence that a criminal statute must be strictly construed, and any ambiguity must be resolved in favor of lenity. *United States* v. *Wiltberger,* 5 Wheat 76, 95; *United States* v. *Halseph,* 342 U.S. 277, 280.

> "When Congress leaves to the Judiciary the task of imputing to Congress an undeclared will, the ambiguity should be resolved in favor of lenity. And this not out of any sentimental consideration, or for want of sympathy with a purpose of Congress in proscribing evil or antisocial conduct." (*Bell* v. *United States,* 349 U.S. 81, 83.)

In any event, the Courts have consistently enjoined themselves from supplying criminal statutes with elements that Congress has chosen to omit. *Arroyo* v. *United States,* 359 U.S. 419, 424.

Standing alone, as it does in 18 U.S.C. 1951, the term "color of official right" is patently ambiguous. Furthermore, the Congress has elected not to limit or qualify the term in any way. Accordingly, applicable precepts of statutory construction mandate that the term be construed as it was at the common law.

Prior to statutory modification, the crime of extortion could be committed only by a public official. *United States* v. *Nardello,* 393 U.S. 286, 289; 4 *Blackstone Commentaries* 141; *Perkins on Criminal Law,* Second Ed., p. 368.

Official duty, then, is the key to extortion under color of official right at common law, and therefore, in the Hobbs Act. The officer must accept money to do something he was already under a legal duty to do. That is the essence of the crime, and only that can constitute a taking under color of official right. The money or thing of value must have been claimed or accepted as a matter of right by virtue of the office held. Consequently, the person paying must yield to official authority in order to obtain something he already had a right to obtain.

> "Extortion involves payment in return for something *to which the payer is already legally entitled.*" (emphasis in original) *United States* v. *Addonizio*, 451 F. 2d 49, 72 (3rd Cir., 1971), *cert. denied*, 92 S. Ct. 949.

It follows as a corollary that it is impossible for an officer to commit extortion under color of official right if he demands compensation or fees for services that it was not his official duty to perform. By the same token, an officer cannot commit the crime if he accepts or demands money or things of value to forego proper performance of his office. But that is exactly what the evidence proved in this case.

All of the victims were paying to avoid what they termed "harrassment". That term was variously defined as arrests, set-up arrests, identification checks, checks of women at the bar for possible B-girl activities, and the like. That motive was accepted by the Court of Appeals. There is nothing in the record below to show payments to officers in order to induce them to perform their duties. On the contrary, all of the payments were made solely to keep those defendants from exercising their assigned dut-

ies. This constitutes classic bribery, and not extortion under color of official right. *People* v. *Diogardi,* 203 N.Y.S. 2d 870, 168 N.E. 2d 683.

That is not to say, however, that bribery and extortion are always mutually exclusive under the Hobbs Act. The same fact situation may constitute both crimes; albeit not extortion under color of official right.

Thus, both *United States* v. *Hyde,* 448 F. 2d 815 (6th Cir., 1971), *cert. denied,* 404 U.S. 1058; and *United States* v. *DeMett,* 486 F. 2d 816 (7th Cir., 1973), involved just such a situation. Public officials were paid in order to influence their acts as public officials. Specifically they were to forego performance of their duty. At the same time, the victims testified that the payments were made because they were in fear of economic harm. Clearly, these were cases in which bribery and *statutory* extortion coincided.

That is not the situation in this case, however. The charge was extortion as at common law, which does exclude bribery by definition. The grand jury forewent charging extortion through wrongful use of economic fear. Consequently, when the Government proved that type of extortion while charging extortion under color of official right, there was a fatal variance.

3. THE DEFENDANTS WERE DENIED THE RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL BY THE SUPPRESSION OF CERTAIN PRETRIAL ORDERS GRANTING IMMUNITY TO SEVERAL DOZEN BAR OWNERS.

On March 22, 1973, an article appeared in one of the Chicago daily newspapers indicating that the Government had procured orders granting immunity to several

prospective witnesses against the defendants. The article further suggested that Chief Judge Edwin A. Robson of the District Court for the Northern District of Illinois had entered the orders pursuant to an *ex parte* motion by the Government, and that the Court had also ordered all of the motions, supporting papers and resulting orders suppressed.

On March 28, 1973, the defendants filed a motion before the Chief Judge in which they asked for an order lifting the suppression of those orders previously entered, if, as it appeared, they had been entered under the name and number of the case then pending in the District Court.

That motion for an order lifting suppression was denied. The suppression remained in effect until almost the close of the Government's case, at which time the trial judge ordered it lifted and the documents were furnished to counsel.

As suspected, all of the motions and orders had been entered under the name and number of the case then being tried. We take the position that the actions of the Chief Judge in this regard constituted a deprivation of the Sixth Amendment right to effective assistance of counsel.

The Court of Appeals for the Seventh Circuit held that the defendants had suffered no prejudice from the suppression of those orders prior to trial. In support of that holding, the Court reasoned that the defendants had no standing to contest the propriety of the grant of immunity, and therefore had no right to be present at the immunity hearings, or even to know of them. In this, it is respectfully submitted, the Court erred.

If counsel were to render effective assistance, they should at least have been aware of the matters presented under the name and title of the case. But that is precisely what was frustrated by the secret hearings and the suppression order.

It is not at all germane that defendants had no right to contest the propriety of the immunity orders. If, as the Court of Appeals urged, having no right to contest a motion deprives a defendant of the right to know of such motion, there arises the specter of clandestine proceedings at once strange and disquieting. A defendant similarly has no right to contest the propriety of a co-defendant's plea of guilty or his subsequent sentencing. However, no reasonable man would suggest that those proceedings could be conducted without knowledge or notice, since they are still part of the case and may affect other defendants directly or indirectly.

Even slight incursions into the area of constitutional privileges tread upon the rights of all. Covert trial proceedings, however secondary, limited and innocuous, offend the sensibilities of a free and open society and cry out for judicial correction. Nevertheless, unless this Court intervenes, the aegis of judicial approval has been cast over a practice, dangerous at best, whereby the Government is permitted to procure *ex parte* orders affecting defendant's rights, and then suppress those orders from that defendant and his counsel without any showing of necessity.[5]

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5. Both Judge Robson and the Court of Appeals for the Seventh Circuit suggested possible danger to those immunized witnesses if their identities became known. There were no findings of fact to indicate even the remotest possbility of danger to the safety of any of the prospective witnesses.

4. THE PETITIONERS WERE DENIED A FAIR TRIAL WHEN EXTENSIVE AND PARTICULARIZED EVIDENCE OF A SEPARATE CONSPIRACY, UNCONNECTED WITH THE CONSPIRACY ON TRIAL, WAS INTRODUCED PURPORTEDLY TO PROVE MOTIVE AND INTENT AS TO TWO OF THE DEFENDANTS.

The Government introduced evidence at the trial concerning a so-called "big club" ostensibly for the purpose of establishing intent and motive as to the defendants Braasch and Barry. This notwithstanding, that the "big club" conspiracy was not alleged in the Indictment and involved proof of facts and criminal activity totally separate from, and unconnected to the crimes charged. According to the Government, the evidence was probative of why Braasch and Barry would participate in and supervise the operation of the "little club" without any financial benefit.

Not content with establishing the existence of a "big club", the prosecutors assaulted the jury with a mass of evidence showing the most intricate details of the secondary uncharged conspiracy. Information was produced establishing a connection between the "big club" and gambling, prostitution, vice—even organized crime and racketeering. Names quite notorious to any reasonably aware Illinoisan were freely discussed, and payoffs ranging into the thousands of dollars a month were established. The

effect on the jury was devastating, and undiminished by any subsequent limiting instruction.[6]

None dispute the fundamental precept that evidence of another crime may be admitted where it explains the circumstances of, or motive for the crime charged; or tends logically to prove any element of the crime. *United States* v. *Wall*, 225 F. 2d 905, 907 (7th Cir., 1955), *cert. denied*, 350 U.S. 935; *United States ex rel. Durso* v. *Pate*, 426 F. 2d 1083, 1086 (7th Cir., 1970), *cert. denied*, 400 U.S. 995.

However, it is the responsibility of the trial judge to weigh the probative value of the evidence proffered as against the prejudicial effect to determine whether it should be admitted. *United States* v. *Pierson*, 419 F. 2d 1020, 1022 (7th Cir., 1969). And when the prejudicial effect outweighs the probative value, it can be an abuse of discretion for the trial court to admit the evidence. *United States* v. *Byrd*, 352 F. 2d 570, 575 (2nd Cir., 1965). As was said in *United States* v. *Page*, 426 F. 2d 1083, 1086, (7th Cir., 1970):

> "When it must be said that the probative value of such evidence, though relevant, is greatly outweighed by the prejudice to the accused from its admission, then the use of such evidence by a State may rise to the denial of fundamental fairness and due process of law."

Assume we accept the conclusion that the prejudicial effect of the *existence* of the contemporaneous conspiracy

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6. The Court of Appeals pointed to the acquittal of some defendants to show lack of prejudice. We point to the guilty verdict of the others to show the opposite effect. Actually, neither position is tenable inasmuch as it is impossible to speculate upon the mental processes of the jurors.

was outweighed by its probative value to prove motive and intent. Still no one could rationally suggest that it was necessary for the Government to elicit all the intimate, inflammatory and prejudicial details.

In *United States* v. *Ostrowsky*, 501 F. 2d 318 (7th Cir., 1974), the Court of Appeals for the Seventh Circuit was confronted with an almost identical situation. The defendants had been tried for violations of Dyer Act[7] and conspiracy to violate the Act. The Government was allowed to introduce evidence of a murder in order to prove the element of knowledge required for a conviction.

The Court of Appeals upheld the propriety of introducing such evidence. However, it was determined that the Government had proved more details than were necessary. Moreover, the proof of superfluous details was so prejudicial as to require a new trial. In so holding, Chief Judge Swygert reasoned, at 501 F. 2d 322, 323:

> "We would rule therefore that under those circumstances the probative value of a minimal amount of evidence pertaining to Croach's murder would outweigh its prejudicial effect. We are of the view, however, that the Government adduced a great amount of evidence pertaining to the murder that was unnecessary. By transgressing the bounds of necessity the Government went beyond the minimal amount of murder evidence we deem admissible * * * It was unnecessary for the Government to present Ostrowsky's reasons for killing Croach. * * * The evidence of the other crime need only be clear and convincing: *it need not, indeed should not, involve a trial within a trial.*" (Emphasis added)

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7. 18 U.S.C. 2313.

Similarly in this case, there was no conceivable need to subject the jury to all the intricate details of the "big club" conspiracy. The mere fact that it had existed and that two of the policemen had been members thereof was more than sufficient to show a motive why those two individuals would have cooperated with the "little club" without accepting any financial benefits. As a consequence, the admission of all the detailed evidence constituted a trial within a trial and was reversible error.

CONCLUSION

For the foregoing reasons, a Writ of Certiorari should issue to review the judgment and opinion of the Court of Appeals for the Seventh Circuit.

Respectfully submitted,

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APPENDIX "A"

IN THE

UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

No. 74-1000 thru 74-1017 and 74-1105

United States of America,

Plaintiff-Appellee,

v.

Clarence E. Braasch, Edward J. Barry, John M. Geraghty, Daniel H. Armstrong, Thomas D. Batastini, Natale R. Cale, John Catalano, Martin D. Eshoo, Edward F. Finn, Carl Flagg, Philip R. Grana, Edward McGee, Emmons P. Russell, Harry R. Salvesen, Joseph A. Schillinger, Steve L. Seno, William D. Swallow, Thomas D. West and Mike Zakoian,

Defendants-Appellants.

Argued June 5, 1974 — Decided October 23, 1974

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division — No. 72 CR 979 — William J. Bauer, *Judge*

Before CLARK, *Associate Justice*,* FAIRCHILD and

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* Honorable Tom C. Clark, Associate Justice (Retired) of the Supreme Court of the United States, is sitting by designation.

STEVENS, *Circuit Judges.*

CLARK, *Associate Justice.* This prosecution, brought under the extortion statute, 18 U.S.C. § 1951,[1] • • •

The indictment covers the period from 1966 to 1970 during the tenure of Captain Clarence E. Braasch as Commander of the 18th Police District and names as co-conspirators more than two dozen police officers who were attached to the 18th District during all or part of that period, including Braasch and three vice coordinators, Sergeants Fischer, Barry and Geraghty. The facts are "stranger than fiction",[2] revealing a brazen extortion scheme involving a shakedown of some 53 bars, taverns and other business establishments serving alcoholic beverages and located within the District. Initially, four police officers on the vice squad — two during daylight hours

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1. 18 U.S.C. § 1951:

(a) Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by • • • extortion or attempts or conspires so to do, • • • shall be fined not more than $10,000 or imprisoned not more than twenty years, or both.

(b) As used in this section • • •

(2) The term "extortion" means the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right.

(3) The term "commerce" means • • • all commerce between any point in a State, Territory, Possession, or the District of Columbia and any point outside thereof • • •.

2. Byron, *Don Juan*, Canto XIV, St. 101.

and two at night — collected $100 to $150 per month from each of such establishments and divided this money, known as the "package", among the members of the vice squad. The *quid pro quo* on the part of the police officers was that they would "protect" the victims of the scheme — known as the "vice club" or "little club" — from enforcement of various regulatory laws and from loss of business, revocation of licenses and other disturbances, some of which were caused by manufactured police harassment.

In the regular operation of the "little club", a vice coordinator would obtain from the police officers of the vice squad a monthly list of the establishments that might be included in the club's collections and present this list to Captain Braasch, who would then strike from it the names of those establishments that he decided should be excluded for various reasons. The resulting list contained the names of the club "members" until the next month's list was approved.

From the testimony, it appears that a similar "club" existed in the district at least as far back as 1961, but abruptly ceased operations in the middle of 1966 when Captain James Holzman was appointed District Commander. The rapid change of command from Holzman to Captain Braasch in August, 1966 marked the beginning of the conspiracy at bar.

Braasch brought with him Sergeant Robert Fischer to be his new Vice Coordinator. Soon after Braasch and Fischer began their new assignments, one Bill Gold, representing certain nightclub and gambling interests in the 18th Police District, telephoned Fischer that he wanted to see him about some business that might be of interest to him and his boss, Captain Braasch, and left his telephone

number. Fischer reported the call to Braasch, who told him to see Gold. At lunch the next day, Gold told Fischer that he would pay Captain Braasch $3,600 per month to protect gambling operations in the 18th District from police harassments and arrests, and, in addition, he would pay $1,500 per month for Braasch to protect ten specific night spots also in the 18th District.

Fischer reported to Braasch, who promptly accepted the offer. This arrangement, known as the "big ten" or the "big club", started in operation in October, 1966, and continued at least during Braasch's tenure as Commander of the 18th District, which ended in 1970. For some 27 months during the operation, Fischer acted as "bagman" for Braasch. The money was collected first from Gold and, after his death, from one Glitta, and ran as high as $6,810 a month. Initially, some of the money was passed on to key police officers, such as Braasch's friend, Barry, a group of Captains and Lieutenants, and two vice squad officers, Cello and Rifkin. The latter two were included because, as Fischer testified, "the only two vice men . . . we would have to worry about would be Rifkin and Cello because they were assigned to work gambling on day . . ."[3] Fischer

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3. After these payments Braasch and Fischer split the balance equally between themselves, except $100 which was given by Gold and Glitta to Fischer as a "tip". During the period that Fischer acted as "bagman", the total payoffs amounted to some $185,000. Braasch received in total about $85,000, and Fischer about $25,000. Barry first received $100 a month as a favor from Braasch, but later $1,000 a month when he became Vice-Coordinator; the Captains as a group received $500 a month; the Lieutenants $600 a month; and Cello and Rifkin $200 each per month.

was succeeded by Barry as "bagman" for the "big club", but the record does not show the take during that period.

In November of 1966, some of the members of the Vice Squad approached Fischer with regard to their resumption of the pre-Holzman practice of collecting monies from retail liquor establishments in the District. The word about the "big club" had gone the rounds of the Vice Squad and its members were anxious to share in the proceeds. When Fischer made it clear that Braasch would not be sharing the payoffs from the "big club", it was suggested that the Vice Squad police officers organize their own "club" among the remaining bars and taverns in the District. Fischer then took this mater up with Braasch who agreed to the proposal. According to Fischer's testimony, when Braasch was apprised of the proposed "club", he commented: "I guess it is not a bad idea if these guys want to make a buck for themselves. We got our own thing going, haven't we?" Braasch's primary concern was that he have a veto power over which establishments would be included.

Braasch was interested not only in making sure that none of the nightclubs in his own "big ten" were being shaken down by the Vice Squad, but also in keeping off the list any "trouble spots" — establishments that catered to prostitutes, operated after hours, or served minors — which might prove embarrassing if the public insisted on police action. Pragmatically, Braasch and Fischer decided not to share in the proceeds of the "little club" for reasons related by Fischer in his testimony. According to Fischer, he told Braasch, when they were privately discussing the "little club" arrangement:

> [I]f there is any complaints on these places and there has to be an arrest made, why, if we weren't taking

> money from it, why we could tell them to go out and make the arrest. But if we were taking money from the thing, we would be in kind of an awkward situation. * * * So, I suggested that we don't participate, partake in any money in this and besides, "We got our own thing going and let's not get hungry."

Braasch agreed.

The original collectors for the "little club" were Cello, Rifkin, Mascolino and Napier, all of whom were Vice Squad officers, and who subsequently testified as witnesses for the Government. Toward the end of 1966 or early 1967, the members of the 18th District Vice Squad held a meeting in the 18th District station house to discuss the functioning of the extortion "club". At that meeting, the officers discussed the procedures to be followed in protecting their "club" members; they discussed the amount of money that would be paid to each vice officer as more bars were recruited; and they discussed which officers would be responsible for collecting the money on each shift.

While Fischer and Barry were Vice Coordinators, Officers Cello, Rifkin, Mascolino, and Napier distributed the money they collected from the bars among the members of the Vice Squad. Cello, Mascolino, Rifkin, and Napier each received approximately $300 and later $500 per month; the other vice men received $150 and later $250 per month as their share of the "package."

Witness Cello testified in the Governmen's case-in-chief that the conditions for membership were as follows:

> The conditions were that they would pay $100 a month to the vice officer that would be collecting. In return, there would be no harassment by members of the vice squad. Under harassment, it would be classified as premise checks, I.D. checks of individuals in

the bars. If it was a gay bar, you would not go in there with flashlights and harass the patrons of the bar. You would assist them in any trouble that they have. If you were assigned to make a followup report, in your followup report you would try to make it or slant it in any way or form that would help the tavern owners.

If you received knowledge that there was — any knowledge or any information that VCD was going to come into the district to make a raid on these taverns, you would forewarn them. Also that none of the vice — there would be no individual shakedowns by any individual vice officer on these taverns if a check had to be made on a tavern, it would be checked out first with one of us.

As the years from 1966 to 1970 went on, other Vice Squad officers assisted in the collection tasks for the "little club". In February, 1967, Fischer was promoted and transferred to other duties outside the 18th District, and Barry succeeded him as Vice-Coordinator. Barry took over the duties of intermediary between the "little club" and Braasch, but he received no money from the "little club" operation, his take being the $1,000 heretofore mentioned from the "big club". As indicated above, however, Fischer continued as "bagman" for the "big club" through January, 1969. In 1970, Sergeant Geraghty succeeded Barry as Vice-Coordinator and continued to perform the same services as the latter, except that Geraghty assumed the monthly responsibility of personally receiving the "package" collected from the "little club" and distributing it among the members of the Vice Squad.

A. *The Indictment and Trial:*

On December 29, 1972, a sixteen-count indictment was returned against twenty-four Chicago police officers, charg-

ing in the first count that they participated in a conspiracy to commit extortion in violation of 18 U.S.C. § 1951 by extracting money under color of official right from the proprietors of the fifty-three liquor establishments comprising the "little club". The remaining fifteen counts of the indictment charged separate violations of 18 U.S.C. § 1623.[4] Each count separately charged one of those named

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4. 18 U.S.C. § 1623 in relevant part provides:

(a) Whoever under oath in any proceeding before or ancillary to any court or grand jury of the United States knowingly makes any false material declaration or makes or uses any other information, including any book, paper, document, record, recording, or other material, knowing the same to contain any false material declaration, shall be fined not more than $10,000 or imprisoned not more than five years, or both.

(c) An indictment or information for violation of this section alleging that, in any proceedings before or ancillary to any court or grand jury of the United States, the defendant under oath has knowingly made two or more declarations, which are inconsistent to the degree that one of them is necessarily false, need not specify which declaration is false if—

(1) each declaration was material to the point in question, and

(2) each declaration was made within the period of the statute of limitations for the offense charged under this section.

In any prosecution under this section, the falsity of a declaration set forth in the indictment or information shall be established sufficient for conviction by proof that the defendant while under oath made irreconcilably contradictory declarations material to the point in question in any proceeding before or ancillary to

in Count One with making false material declarations to the Grand Jury by appearing before the Grand Jury and falsely denying his participation in the "little club" extortion scheme.[5]

At the trial before Judge William J. Bauer which began on August 13, 1973, the Government presented the testimony of seven police officers who had formerly been assigned to the 18th Police District. Five of them — Fischer, Cello, Rifkin, Mascolino and DuShane — testified under immunity granted pursuant to 18 U.S.C. § 6002; the sixth, Anthony Corsentino, testified without immunity; and the seventh, Lowell Napier, one of those originally indicted, pled guilty before trial and testified. These officers testified to their own complicity in the "little club" and to the involvement of those on trial. In addition, 48 witnesses were produced by the Government who were owners or employees of the liquor establishments in the "little club"; who testified under a blanket immunity grant, and who

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any court or grand jury. It shall be a defense to an indictment or information made pursuant to the first sentence of this subsection that the defendant at the time he made each declaration believed the declaration was true.

5. Of the twenty-three defendant who went on trial, eight were charged only in Count One (conspiracy); Police Sergeant Barry, Police Officers Cale, Catalano, Finn, McGee, Salveson, Seno, and Zakoian. The remaining fifteen were charged in Count One and in one of the fifteen individual counts of false declarations to the Grand Jury: Police Captain Braasch, Police Sergeant Geraghty, Police Officers Armstrong, Batastini, Demke, Eshoo, Flagg, Grana, Lazar, Pierson, Russell, Schillinger, Swallow, Troche, and West.

asserted that they had personally made payments to the police officers who were collecting extortion money for the Vice Squad. The trial was concluded on October 3rd, and the jury found nineteen defendants involved in the instant appeal guilty, and found four others — Demke, Lazar, Pierson and Troche — not guilty on all charges.

We have read the 6,836-page record and find that it reveals a carefully organized and skillfully operated extortion machine of massive proportions in both membership as well as monetary "take", which operated over several years and corrupted the entire Vice Squad of the 18th Police District, including its top officials. The testimony of the 48 proprietors and employees of the participating "little club" members established that the extortion payments were made. The testimony of the bagmen Cello, Rifkin, Mascolino and Napier confirmed that they had received the payments and disbursed them to police officers of the Vice Squad as well as to themselves. The testimony of DuShane, who was the police officer assigned to clerical work in the Vice Squad, detailed fiscal arrangements. And the testimony of Fischer explained the organization of the "little club"; why certain officers, such as Cello and Rifkin, were included in the payoff of both the "little" and "big" clubs; and the intimate conversations that he had with Braasch that tied the latter inextricably to the "little club" conspiracy and revealed the depths of venality to which Braasch would stoop to protect his "own thing" — the "big club".[6]

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6. Exclusive of the "big club" evidence pertaining to the motivation of Captain Braasch and his various vice coordinators, a number of factors connect each of the remaining appellants to the conspiracy. First, most of them

B. *The Issues Tendered Here:*

The appellants raise the following issues, some sixteen in number:

(1) Were the statutory requirements of 18 U.S.C. § 6001 *et seq.* met in granting immunity to various Government witnesses;

(2) Was it proper for the trial court to have suppressed the orders granting such immunity;

(3) Was the grand jury process abused by calling certain prospective Government witnesses before the grand jury after the indictment was returned;

(4) Did the re-assignment of the case to another judge several weeks before trial but after completion of pre-trial motions violate appellants' constitutional protections;

(5) Did the conspiracy "affect commerce" within the meaning of 18 U.S.C. § 1951;

(6) Was knowledge and intent sufficiently proven;

(7) Was the evidence sufficient to prove Braasch's participation in the conspiracy;

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received a monthly share of the "package" after joining the District Vice Squad; second, many participated in the actual collecting of money from the victim bars; third, some participated in the distribution of the "package"; fourth, some names appeared on a list indicating that they received a share for one month in early 1967; and, fifth, some officers attended the Vice Squad meeting in late 1966 or early 1967 at which the "club" and the "package" were discussed at length. The evidence at trial from the representatives of the bars and taverns as well as that from Fischer, Rifkin, Cello, and the other officers who testified for the Government tied each of the appellants to one or more of these factors.

(8) Was the evidence sufficient to prove that Grana's declarations before the Grand Jury were false;

(9) Was the admission of the evidence as to the "big club" improper as to Braasch and Barry and so highly prejudicial to the other appellants as to have denied them a fair trial;

(10) Were the twenty-four defendants and sixteen counts properly joined in the indictment;

(11) Does a police officer's abuse of the power of his official position in order to obtain payments from merchants come within the meaning of 18 U.S.C. § 1951's ban on extortion "under color of official right".

(12) Was it proper to admit evidence of a similar extortion scheme within the 18th District antedating the conspiracy at bar;

(13) Was it proper to admit evidence showing the state of mind of the extortion victims;

(14) Did other evidentiary rulings result in prejudice to the appellants;

(15) Did the prosecutor's closing argument constitute reversible error because of his references to the evidence tying appellant Grana to the conspiracy; and

(16) Was there an abuse of discretion in the sentences imposed.

The bulk of these issues are either frivolous or controlled by previous decisions and do not merit extended discussion. We will deal with them in the order above outlined.

C. *Disposition of the Issues:*

I.

Appellants claim that the Government failed to comply with 18 U.S.C. § 6002 which, they argue, requires that a witness actually refuse to testify before being granted immunity. Unfortunately for the success of their claim, 18 U.S.C. § 6003 (b) (2) specifically authorizes the Government to seek such a grant where the witness "has refused *or is likely to refuse* to testify or provide other information on the basis of his privilege against self-incrimination." (Emphasis supplied) Appellants also claim that the trial court's immunity orders were too broad, prohibiting the use of the immunized testimony against bar owner-witnesses not only in criminal trials but also in subsequent state administrative proceedings, such as liquor license revocation hearings. However, we need not pass on this difficult question since appellants have no standing to raise the question. *United States* v. *Lewis*, 456 F. 2d 404, 410 (3d Cir. 1972); *United States ex rel. Berberian* v. *Cliff*, 300 F. Supp. 8, 14 (E.D. Pa. 1969). *Cf. Lopez* v. *Burke*, 413 F. 2d 992, 994 (7th Cir. 1969).

II.

Appellants further claim that suppression of the orders granting immunity to several dozen bar owners violated their Sixth Amendment right to the effective assistance of counsel by being denied important information. The suppression orders were entered by Chief Judge Edwin A. Robson in March of 1973, "[i]n order to encourage further disclosures and in order to protect the personal safety

and security of the informers and potential witnesses by concealing their identity." Since, as we have said, a defendant has no standing to contest the propriety of a grant of immunity, it follows that appellants had no right to be present at the immunity hearings nor any right to obtain the identity of Government witnesses by or through being furnished copies of the orders granting immunity. Chief Judge Robson denied appellants' motions to lift the suppression order and we agree with his conclusion on the matter. It also follows that defense counsel had no right to be at the immunity hearings. *Cf. United States* v. *Bennett*, 409 F. 2d 888, 899 (2d Cir.), cert. den. sub. nom *Haywood* v. *United States*, 396 U.S. 852, (1969), holding that defense counsel's presence is not required when a prosecutor interrogates a prospective witness in preparation for trial. Moreover, no possible prejudice could have arisen since a copy of the immunity orders was provided the defense with the Section 3500 material at the conclusion of the direct examination of the first immunized witness and was used by appellants' counsel in cross-examination.

III.

Appellants next complain that the Government abused the grand jury process by calling prospective witnesses before the Grand Jury for the purpose of preparing an already pending indictment for trial. The short answer is that the Government even when the evidence received may also relate to a pending indictment. *Beverly* v. *United States*, 468 F. 2d 732, 742 (5th Cir. 1972). Appellants have shown no prejudice from these occurrences and their contention must fail. *United States* v. *Star*, 470 F. 2d 1214, 1217 (9th Cir. 1972).

IV.

Appellants next claim that their constitutional protections were violated because of the transfer of the case to another judge. This is frivolous. A litigant does not have a right to have his case heard by a particular judge. *United States* v. *Dichiarinte*, 385 F. 2d 333, 337 (7th Cir. 1967), cert. den., 390 U.S. 945 (1968); *United States* v. *Stone*, 411 F. 2d 597, 598-9 (5th Cir. 1969). The fact that the original judge decided pretrial motions is of no consequence. In central calendar courts that is done every day. *United States* v. *Marachowsky*, 213 F. 2d 235, 244 (7th Cir. 1954), clearly approves the action of one judge sitting for another to make any order necessary to preserve the rights of the parties.

V.

Appellants also challenge the technical sufficiency of the Government's proof that their conduct "affects commerce" within the meaning of 18 U.S.C. § 1951. At the outset we note that there were no objections to the trial court's instructions as to what constitutes effect on commerce. Section 1951 proscribes extortion which "in any way or degree obstructs, delays or affects commerce or the movement of any article or commodity in commerce . . ." As this Circuit held in *United States* v. *De Met*, 486 F. 2d 816 (7th Cir. 1973), cert. denied, 94 S. Ct. 1991 (1974):

> Because Congress has seen fit to exercise its full power under the commerce clause, extortionate conduct having an arguably *de minimus* effect on commerce may nevertheless be punished. [486 F. 2d at 821]

The record indicates that representatives of eleven Chicago area wholesale distributors of beer and liquor testified as to their purchases of alcoholic beverages from numerous

locations outside the state and six other wholesale distributors were included by stipulation. Voluminous sales and purchase records of the establishments in the "little club" were admitted into evidence. The dependence of the Chicago retail liquor establishments upon interstate commerce for a supply of alcoholic beverages was fully covered by the testimony of the Chief of Technical Services Branch of the Office of the Regional Director of the Mid West Region of the Alcohol, Tobacco and Firearms Bureau. It revealed a limited number of distilleries and wine manufacturers located in the State of Illinois during the period covered by the conspiracy. This proof shows that the impact on interstate commerce was substantial rather than *de minimis*. Nor is there merit to the further contention that the warehousing of the alcoholic beverages prior to sale severs the interstate nexus. *See United States* v. *Gill*, 490 F. 2d 233, 236 (7th Cir. 1973).

VI.

Appellants also claim that they did not know of either the extortionate nature of the conspiracy, the source of the money they received, or the interstate impact of their involvement. It may well be that each of the appellants did not know of the minute details of the operation of the "little club", but once the conspiracy was established -- the evidence of which was overwhelming — slight evidence is sufficient to connect a particular participant. *See United States* v. *Robinson*, 470 F. 2d 121, 123 (7th Cir. 1972); *United States* v. *Marrapese*, 486 F. 2d 918, 921 (2d Cir. 1973); *United States* v. *Nunce*, 483 F. 2d 453, 460 (9th Cir. 1973). Each of the appellants were Chicago police officers assigned to the vice squad, except Braasch, who

was their boss; each received money every month from the "little club" operation, except Braasch, Fischer and Barry; they knew the money was not due them or their office by reason of their official position; the record directly connects most of the officers with the fact that the money came from the liquor establishments since four of them were collectors of it and others were present when money was collected: Armstrong, Batastini, Catalano, Eshoo, Finn, Flagg, Grana, Russell, Salvesen and Seno; the operation of the club was freely discussed among the vice officers; Barry was told all about it when he first became Vice-Coordinator; a meeting of the Vice Squad members was held in the 18th District Police Station for the purpose of discussing the "little club"; and Officer DuShane testified that he had conversations about the "little club" with every vice officer assigned to the District during the time in question. Moreover, during the entire relevant period — 3½ years — only three arrests were made by the Vice Squad officers at the 53 bars that were in on the "little club", and after March, 1967, not a single arrest was made by any member of the Vice Squad. In our view the evidence was overwhelming.

VII.

In arguing the insufficiency of the evidence to support his conviction, Braasch specifically attacks the credibility of Fischer. That, of course, was a matter the jury decided against Braasch, and we have no power to set aside their determination on the point. Besides, Fischer was corroborated in large part by Cello, Rifkin, and Napier.

VIII.

Grana claims that the Government failed to prove beyond a reasonable doubt that he made false declarations to the Grand Jury as alleged in Count Seven, relying on *Bronston* v. *United States,* 409 U.S. 352 (1972). But that case is not apposite, since it involved an ambiguous question and a true but unresponsive answer. The questions put to Grana were not ambiguous, nor were his answers unresponsive. Indeed, the latter were unequivocal negative responses to questions probing his knowledge of and participation in the extortion scheme.

IX.

As we have indicated in our factual resumé, the Government introduced evidence concerning a "big club" payoff that was not alleged in the indictment. It was introduced solely for the purpose of establishing intent and motive as to Braasch and Barry's participation in the "little club" conspiracy and the trial court so advised the jury with carefully worded instructions. Braasch and Barry, who received none of the proceeds from the "little club", assert that the jury was so inflamed by this evidence that it convicted them for that crime rather than the one charged in the indictment. The remaining appellants also claim prejudice and assert that the jury was confused by the introduction of this separate and uncharged conspiracy into the case. In response, the Government asserts that Fischer's role as Braasch's "bagman" for the "big club" payoffs — a role later undertaken by Barry — was absolutely necessary to paint the whole picture of the "little club" operation and to explain the motive of Braasch,

Fischer, and Barry in approving its organization. Since Braasch and his Vice Coordinators had their "own thing going", it was necessary to protect that operation, i.e., the "big club". By examining the monthly lists of establishments in the "little club" which were submitted for his approval, Braasch was able to make certain that there would be no conflict between the two operations. Moreover, the record shows that word of the "big club" had gone the rounds of the Vice Squad and there was dissatisfaction because the Vice Squad was not in on the take. It is a reasonable inference that Braasch concluded that unless he took steps to satisfy the Vice Squad, this dissatisfaction would increase as time passed and disclosure of the "big club" would inevitably result.

It is well-established that proof of motive is one of the exceptions to the general rule that evidence of "other crimes" not charged in the indictment is inadmissible in the prosecution's case-in-chief. *See United States ex rel. Durso* v. *Pate*, 426 F. 2d 1083, 1086 (7th Cir. 1970), cert. denied, 400 U.S. 995 (1971). As in most questions regarding the admissibility of evidence, trial judges are given wide discretion to balance the proffered item's probative value against its prejudicial effect. *See United States* v. *Gaus*, 471 F. 2d 495, 499 (7th Cir.), cert. denied, 412 U.S. 938 (1973). We can see no abuse of discretion here.

True it is that detailed evidence as to a similar, contemporaneous conspiracy has a potentially prejudicial effect, but here that effect was outweighed by the importance of this motive evidence as well as the District Court's cautious and thorough limiting instructions which were delivered to the jury not only at the conclusion of witness Fischer's direct examination, but again after witnesses Cello and Murphy testified briefly as to their involvement

in the "big club", and for a third time in the final charge to the jury. These instructions specified that the "big club" evidence was not to be used against any other of the defendants besides Braasch and Barry, and as to them it was only to be considered as it relates to their motive and intent to participate in the "little club" conspiracy charged in the indictment. We have no reason to doubt the effectiveness of these carefully drawn instructions. *See United States* v. *Pauldino*, 443 F. 2d 1108, 1114 (10th Cir.), cert. denied, 404 U.S. 882 (1971). The jury verdict — in which four of the twenty-three defendants were acquitted — itself supports this conclusion.

Appellant Braasch additionally claims that his constitutional right to be informed of the nature and cause of the accusation against him, guaranteed by the Sixth Amendment, was infringed by the omission of any mention of the "big club" in the indictment. The right to be informed of the accusation is a central right in our constitutional system, but it does not place a limitation on the evidentiary rule which allows the introduction of "other crimes" evidence in the proper circumstances. *Cf. McConkey* v. *United States*, 444 F. 2d 788, 789 (8th Cir.), cert. denied, 404 U.S. 885 (1971). Here the Government notified counsel for Braasch on August 27th, some two weeks before Fischer testified — and weeks before it closed its case — that it would introduce just such evidence pertaining to his involvement in uncharged criminal conduct in order to prove his motive for participating in the "little club". *United States* v. *Baum*, 482 F. 2d 1325 (2d Cir. 1973), on which appellant Braasch relies, is therefore distinguishable since appellant had both notice and opportunity to meet the Government's proof of concurrent criminal conduct.

X.

Appellants argue that it was prejudicial under Fed. R. Crim. P. 14 to join the conspiracy count which names all of the 24 conspirators, with the 15 separate perjury counts, each of which named a single conspirator. They rely on the panel opinion in *United States* v. *Pacente,* 490 F. 2d 661 (7th Cir. 1973), which reversed the convictions of a Chicago police officer on a similar indictment charging both extortion and perjury. Since the time that briefs were submitted in the present case, however, an *en banc* reconsideration of the *Pacente* opinion has resulted in its reversal, *United States* v. *Pacente,* No. 72-1988 (7th Cir., filed August 6, 1974), so that such a joinder has now been given full approval by this circuit. Moreover in the instant case, the trial judge in his charge specifically instructed the jury to give separate consideration to each count and to render separate verdicts on each defendant. The charge admonished the jury further that each defendant was entitled to have his guilt or innocence determined from his own conduct and from the evidence as applied to him as if he were being tried alone and that the guilt or innocence of any one defendant should not influence the jury's verdict respecting the others. Further, with regard to the perjury counts, the charge instructed that testimony introduced as to them was to be considered only as evidence of the false material declaration charge and that the jury should not consider that testimony as evidence of any defendant's guilt as to Count One of the indictment. The fact that the jury found four of the defendants not guilty on both the conspiracy and the respective perjury counts showed that they not only knew what they were doing but did what they intended. *See United States* v. *Gill,* 490 F. 2d

233, 239 (7th Cir. 1973). We add that the massive duplication of effort entailed in separate trials is not justified absent a more specific claim of prejudice than the one now urged by appellants. *Cf. United States* v. *Haim*, 218 F. Supp. 922, 932 (S.D. N.Y. 1963); *United States* v. *Verra*, 203 F. Supp. 87, 90 (S.D. N.Y. 1962).

Some of the appellants contend that the joinder of so many defendants in a single indictment deprived them of the privilege of calling a co-conspirator to the stand to testify in their behalf. None of the appellants, save Braasch, attempted to make any positive showing of either the utility or the availability of such testimony. As this circuit has held again and again "[t]he unsupported possibility that such testimony might be forthcoming does not make the denial of a motion for severance erroneous". *United States* v. *Kahn*, 381 F. 2d 824, 841 (7th Cir.), cert. den., 389 U.S. 1015 (1967). Braasch claims that his co-defendant Barry could have testified that Fischer (the Government's star witness against Braasch) told Barry that he (Fischer) had denied to the Government any involvement in any extortion scheme, stating to Barry further: "They [the prosecutors] want Braasch and the only way I could give them Braasch is to lie". However, when the trial judge held an in-chambers *voir dire* on the matter, Barry invoked the Fifth Amendment and refused to answer all questions, including whether he would testify on behalf of Braasch in a separate trial if severance was granted. The facts here are, therefore, a far cry from the leading case of *United States* v. *Echeles*, 352 F. 2d 892 (7th Cir. 1965), where a co-defendant repeatedly offered to give obviously exculpatory testimony. Barry's refusal to give such assurance left Braasch without that one element which

was essential to his motion for severance. *See United States* v. *Johnson*, 426 F. 2d 1112, 1116 (7th Cir. 1970); *United States* v. *Caci*, 401 F. 2d 664, 672 (2d Cir. 1968).

XI.

The appellants assert that the crime, if any, charged and proven here is not cognizable under the provisions of the Hobbs Act utilized in the indictment, i.e., extortion "under color of official right". Extortion "under color of official right" as used in the Act, they say, means either the acceptance of money by a public official to perform an act that he was already under a legal duty to perform or, alternatively, the taking of money under a claim by the officer that he had an official right to the money by virtue of his office. Here, they urge, the proof showed only that the appellants took money to refrain from performing their duties and thus their conduct could not be included in the statutory phrase "under color of official right", but instead "constitutes classic bribery", citing *People* v. *Dioguardi*, 8 N.Y. 2d 260, 203 N.Y.S. 2d 870 (1960), and other New York cases. Pursuing this line of argument, appellants contend that there was a fatal variance between indictment and proof since the conduct proved did not fall within the "official right" extortion charged and the Government failed to charge them with the other type of extortion covered by the first clause of 18 U.S.C. § 1951 (b)(2) —extortion by the wrongful use of actual or threatened force, violence or fear.

Appellants, however, overlook the fact that the evidence shows that the conspirators used the power and authority vested in them by reason of their office to obtain money not due them or due the office. The use of office to obtain

payments is the crux of the statutory requirement of "under color of official right", and appellants' wrongful use of official power was obviously the basis of this extortion. *See United States* v. *Staszcuk*, No. 73-1869 (7th Cir., filed Sept. 10, 1974). It matters not whether the public official induces payments to perform his duties or not to perform his duties, or even, as here, to perform or not to perform acts unrelated to his duties which can only be undertaken because of his official position. So long as the motivation for the payment focuses on the recipient's office, the conduct falls within the ambit of 18 U.S.C. § 1951. That such conduct may also constitute "classic bribery" is not a relevant consideration.[7]

The police officers of the vice squad harassed bars, taverns and liquor establishments through their official position by making unusually frequent premise checks (four times a day) and identification examinations of patrons; they inspected bars catering to homosexuals with flashlights and harassed the patrons; they individually "shook down" proprietors often; they set-up under-aged drinkers in bars in order to frame a violation of law; and they sent liquor licensing authorities false reports about bars, resulting in cancellations. In short, a set of roving police officers preyed upon the vulnerable position of the bars in the 18th District for their own profit. The proprietors wished to stop this sort of harassment, and the payment of "protection" money appeared to be the only answer. It may be

---

7. As appellants themselves point out, "the modern trend of the federal courts is to hold that bribery and extortion as used in the Hobbs Act are not mutually exclusive. *United States* v. *Kahn*, 472 F. 2d 272, 278 (2d Cir. 1973), *cert. den.*, 411 U.S. 982, 93 Sup. Ct. 2270."

that some of the payments were made from fear of economic harm, which does come within the type of coercive extortion prohibited by the first clause of 18 U.S.C. § 1951 (b)(2) and not by the clause relating to extortion "under color of official right".[8] Nevertheless, it was appellants' misuse of the power of their office that triggered the harm as well as the payments in this case and made it the type of extortion charged in the indictment. We must, therefore, reject their contention.

---

8. It may be true that duress is an essential element of a case prosecuted under the provision of the Hobbs Act relating to "wrongful use of actual or threatened force, violence or fear", but coercive extortion is not the only type outlawed by the Act. The other is inducing payoffs "under color of official right"; and that offense does not require proof of coercion. Few cases have dealt with the distinction between these offenses, but several are relevant. *See United States* v. *Kenny*, 462 F. 2d 1205 (3d Cir.), cert. den., 409 U.S. 914 (1972). *See also United States* v. *Nardello*, 393 U.S. 286 (1969) (Warren, C. J.) (discussing labels and classification of extortion offenses by the states); *Bianchi* v. *United States*, 219 F. 2d 182, 193 (8th Cir.), cert. den., 349 U.S. 915 (1955); *United States* v. *Sutter*, 160 F. 2d 754, 756 (7th Cir. 1947); *United States* v. *Hyde*, 448 F. 2d 815, 832-4 (5th Cir. 1971), cert. den., 404 U.S. 1058 (1972); *United States* v. *Pranno*, 385 F. 2d 387, 390 (7th Cir. 1967), cert. den., 390 U.S. 944 (1968); *United States* v. *De Met*, 486 F. 2d 816, 823 (7th Cir. 1973) (Swygert, C. J., concurring). Here, the Congress intended to and did exercise all of its power under the Constitution, and the Act is to be construed broadly. *United States* v. *Pranno*, 385 F. 2d at 389. *See also* Stern, "Prosecutions of Local Political Corruption Under the Hobbs Act: The Unnecessary Distinction Between Bribery and Extortion"; 3 Seton Hall L. Rev. 1 (1971).

CONCLUSION

We have carefully considered the remaining issues raised by appellants regarding admissibility of background, state of mind and other evidence, the prosecutor's closing argument, and the trial judge's sentencing of appellants. We find these claims without merit and therefore affirm the judgment.

AFFIRMED.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

APPENDIX "B"

UNITED STATES COURT OF APPEALS

For the Seventh Circuit

Chicago, Illinois 60604

November 21, 1974

Before

Hon. TOM C. CLARK, Associate Justice
Hon. THOMAS E. FAIRCHILD, Circuit Judge
Hon. JOHN PAUL STEVENS, Circuit Judge

No. 74-1000 thru
74-1017 and 74-1105

UNITED STATES OF AMERICA, Plaintiff-Appellee, vs. CLARENCE E. BRAASCH, et al., Defendants-Appellants.	Appeal from the United States District Court for the Northern District of Illinois, Eastern Division (72 CR 979)

This matter comes before the court on the five separate petitions for rehearing filed herein by various defendants-appellants. They are:

The "Petition For Rehearing en banc" filed herein on November 5, 1974 by counsel for defendants-appel-

lants Natale Cale, John Catalano, Edward Finn, Harry Salvesen, Steve Seno and William Swallow;

The "Petition For Rehearing On Behalf of Appellants Daniel Armstrong, Thomas Batastini, Martin Eshoo, Carl Flagg, Emmons Russell, Joseph Schillinger and Thomas West" filed herein on November 6, 1974;

The "Petition For Rehearing en banc" filed herein on November 6, 1974 by defendant-appellant Edward J. Barry, pro se;

The "Petition For Rehearing En Banc by Defendant-Appellant Clarence E. Braasch" filed herein on November 7, 1974. And

"Petition For Rehearing On Behalf Of Edward McGee, Philip R. Grana, John M. Geraghty And Mike Zakoian", which requests en banc consideration on page eleven thereof, filed herein on November 7, 1974.

No judge in active service has requested a vote thereon, and no judge has voted to grant the suggestion for en banc consideration. All the members of the panel have voted to deny rehearing in each of the aforesaid petitions. On consideration whereof,

IT IS ORDERED that all five of the petitions for rehearing filed herein be, and they are hereby, DENIED.

NOTE: Judge Philip W. Tone disqualified himself from consideration of any of these petitions.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-781

UNITED STATES OF AMERICA,

Respondent.

VS.

JOHN M. GERAGHTY,
PHILIP R. GRANA,
EDWARD McGEE,
MIKE ZAKOIAN,

Petitioners.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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Keenan Printing Company 268

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. ——

UNITED STATES OF AMERICA,

Respondent.

VS.

JOHN M. GERAGHTY,
PHILIP R. GRANA,
EDWARD McGEE,
MIKE ZAKOIAN,

Petitioners,

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioners pray that a Writ of Certiorari be issued to review the judgment of the United States Court of Appeals for the Seventh Circuit entered in this case on October 23, 1974.

OPINION BELOW

The opinion below has not yet been published but is reprinted herein as Appendix A infra.

JURISDICTION

The judgment of the United States Court of Appeals for the Seventh Circuit (Appendix A infra) was entered on October 23, 1974. A timely motion for a petition for rehearing en banc was denied on November 21, 1974. (Appendix B, infra) This petition is filed within 30 days of the final order of the United States Court of Appeals. The jurisdiction of this court is invoked under 28 U.S.C. 1254(1).

HISTORY OF THE CASE

Your petitioners, along with nineteen other Chicago policemen, were indicted for conspiracy to extort monies from tavern owners in a particular district in Chicago in violation of 18 U.S.C. 1951. Fifteen of the defendants were also charged with giving false declarations before a Grand Jury in fifteen separate perjury counts. The basis of those counts was that these officers denied the accusation of taking money from the tavern owners while they, the officers, were under oath in the Grand Jury. Motions to sever the counts and motions for severance of defendants were denied prior to trial. After a lengthy trial, nineteen defendants were convicted and four defendants were acquitted.

QUESTIONS PRESENTED

1. Was the joinder of a conspiracy count with fifteen separate perjury counts proper under Rules 8(b) and 14 of the Federal Rules of Criminal Procedure?

2. Was the joinder of defendants charged only on the conspiracy count proper when joined with other defendants charged with making false statements in the Grand Jury where there was no allegation that such false testimony was part of the conspiracy?

3. Was the admission of evidence of another conspiracy between only two of the defendants so highly prejudicial to the other appellants as to have denied them fair trial?

4. Was the evidence sufficient to convict petitioner Grana of perjury when his answers were literally true?

5. Did the prosecutor's closing argument asking the jury to make an identification of Grana when the government's witness did not, deny the defendant Grana his constitutional right to confrontation of witnesses?

CONSTITUTIONAL PROVISIONS INVOLVED

"No person shall . . . be deprived of life, liberty, or property without due process of law. . . ."

Amendment 5 to the United States Constitution.

"In all criminal prosecutions, the accused shall enjoy the right to be informed of the nature and cause of the accusation . . . to be confronted with the witnesses against him. . . ."

Amendment 6 to the United States Constitution.

RULES INVOLVED

Rule 8(b) of the Federal Rules of Criminal Procedure reads:

> "Joinder of Defendants. Two or more defendants may be charged in the same indictment or information if they are alleged to have participated in the same act or transaction or in the same series of acts or transactions constituting an offense or offenses. Such defendants may be charged in one or more counts together or separately and all of the defendants need not be charged in each count."

Rule 14 of the Federal Rules of Criminal Procedure reads in part:

> "If it appears that a defendant or the government is prejudiced by a joinder of offenses or of defendants in an indictment or information or by such joinder for trial together, the court may order an election or separate trials of counts, grant a severance of defendants or provide whatever other relief justice requires."

REASONS FOR GRANTING THE WRIT

I.

THE JOINDER OF THE CONSPIRACY COUNT WITH FIFTEEN SEPARATE PERJURY COUNTS WAS IMPROPER UNDER RULE 8(b) OF THE FEDERAL RULES OF CRIMINAL PROCEDURE AND FURTHER THE COURT SHOULD HAVE SEVERED THE COUNTS PURSUANT TO RULE 14.

A.

Petitioners Grana And Geraghty Were Prejudiced By The Joinder Of The Conspiracy Count With Other Counts Charging Them With Perjury.

All defendants were charged in Count I of the indictment with conspiracy to extort monies from tavern owners who were engaged in interstate commerce in violation of 18 U.S.C. 1951. Petitioners Geraghty and Grana were **The Joinder Of The Conspiracy Count With Other Counts** charged in counts 2 and 7, respectively, with committing perjury before a Grand Jury regarding the events which were the basis of the conspiracy count. Pre-trial motions to sever the counts were denied.

At the time that both petitioners testified before the Grand Jury there existed Rule 51 of the Chicago Police Department which allowed for disciplinary proceedings against any police officer who invoked his constitutional privilege against self-incrimination before a Grand Jury. While under the compulsion of exercising their constitutional right not to testify and thereby incurring possible revocation of their jobs, the petitioners answered the questions put to them in the Grand Jury. It is on the basis of

their answers denying any involvement in any illegal conduct which formed the basis for the perjury counts.

The trial jury was thus presented with knowledge that these petitioners were not believed by twenty-three other citizens when they denied the accusations against them. Had it not been for the joinder of the perjury counts no evidence of a perjury indictment would have been admissible in the conspiracy trial so that the prejudice of the joinder is manifest. Subsequent to the indictment Rule 51 was declared unconstitutional by the Seventh Circuit Court of Appeals, *Confederation of Police* v. *Conlisk*, 489 F. 2d 881 (7th Cir., 1974).

The Seventh Circuit also had difficulty originally deciding this question in the case of *United States* v. *Pacente* where the original Seventh Circuit panel held that the joinder was prejudicial under Rule 14, *United States* v. *Pacente*, 490 F. 2d 661 but *en banc* reconsideration of that opinion affirmed the joinder. *United States* v. *Pacente* (74-1988 filed Aug. 6, 1974).

What was in effect done here was that witnesses who later became defendants were arraigned under oath and when they denied the accusation, they were indicted for perjury. The stigma of standing trial on one charge is difficult enough without also having the trial jury constantly aware that other citizens such as they have deemed the defendants to be perjurers.

Because the Seventh Circuit had great difficulty in deciding this issue in *Pacente*, we urge this Court to make a definitive ruling on such a joinder.

B.

All The Petitioners Were Prejudiced By The Joinder Of the Conspiracy Count With All Other Defendants' Perjury Counts.

The conspiracy count of the indictment charged twenty-four defendants with agreeing to extort money under color of official right from various tavern owners in Chicago. There was no allegation that it was a part of the conspiracy that various defendants testify falsely when and if called before a Grand Jury, yet fifteen separate perjury counts were joined with the conspiracy count. Furthermore, petitioners McGee and Zakoian were never charged in a perjury count. Such joinder violates Rule 8(b) of the Federal Rules of Criminal Procedure and the trial court should have at least severed the counts pursuant to Rule 14 of the same rules.

Rule 8(b) specifically allows joinder of two or more defendants in the same indictment if they were alleged to have participated in the same act or transaction or in the same series of acts or transactions constituting an offense or offenses.

There is no allegation as mentioned above that there was ever an agreement to testify falsely and in fact, McGee and Zakoian risked their jobs (because of the aforesaid Rule 51) and stood on their constitutional rights not to testify.

A violation of Rule 8(b) requires a reversal. *MeElroy* v. *United States,* 164 U.S. 76, 17 S. Ct. 31, 41 L. Ed. 355 (1896); *Metheany* v. *United States,* 365 F. 2d 90 (9th Cir. 1966); *United States* v. *Spector,* 326 F. 2d 345 (7th Cir. 1963).

This Court in *McElroy* v. *United States, supra,* held:

> "The several charges in the four indictments were *not against the same* persons, nor were they for the same act or transaction, nor for two or more acts or transactions connected together; and in our opinion they were not for two or more acts or transactions of the same class of crimes or offenses which might be properly joined, because they were substantive offenses, separate and distinct, complete in themselves and independent of each other, committed at different times and not provable by the same evidence."
>
> "While the general rule is that counts for several felonies of the same general nature, requiring the same mode of trial and punishment, may be joined in the same indictment, subject to the power of the court to quash the indictment or to compel an election, each joinder cannot be sustained where the parties are not the same and where the offenses are in no wise parts of the same transaction and must depend upon evidence of a different state of facts as to each or some of them. It cannot be said in such case that all the defendants may not have been embarrassed or prejudiced in their defense, or that the attention of the jury may not have been distracted to their injury in passing upon distinct and independent transactions."

The Seventh Circuit has also held that the test for deciding whether acts of defendants are part of a series of transactions depends on the existence of a common plan. *United States* v. *Scott,* 413 F. 2d 932 (7th Cir. 1969).

The Eighth Circuit in *Chubet* v. *United States,* 414 F. 2d 1018 (8th Cir. 1969) was faced with an indictment wherein Chubet was charged in two counts with a man named Kauffman for the sale of certain drugs. Kauffman was also charged in four other counts with persons

other than Chubet for sales of the same drugs. The Court held in reversing Chubet's conviction that the mere fact that Kauffman was involved in all of the counts was insufficient for joining Chubet in the counts in which he was not involved.

The Tenth Circuit in *United States* v. *Eagleston*, 417 F. 2d 11 (10th Cir. 1969), the Count found an improper joinder where one defendant was not charged in a separate and distinct charge of the unlawful transportation of a stolen vehicle.

While Rule 8(a) of the Federal Rules of Criminal Procedure, which governs the question of joinder where there is only one defendant, allows for joinder of offenses which are of a similar nature, Rule 8(b), which governs joinder of multiple defendants, does not allow joinder merely because the offenses are similar in character. *United States* v. *Roselli*, 432 F. 2d 879 (9th Cir. 1970).

There was no allegation of a common plan to give false testimony and these petitioners whose cases were improperly joined could not avoid having the jury infer that because a Grand Jury believed that fifteen officers lied about receiving money there must therefore be some substance to the conspiracy count which charged them all with receiving the money.

There was no allegation nor was there any proof that any of these petitioners procured any false testimony or encouraged anyone to testify falsely before the Grand Jury. Rule 8(b) was violated and at the very least the Court should have severed the conspiracy count from all of the perjury counts pursuant to Rule 14.

II.

THE ADMISSION OF EVIDENCE OF ANOTHER CONSPIRACY IN WHICH NONE OF THE PETITIONERS WERE ALLEGED TO HAVE BEEN MEMBERS WAS SO HIGHLY PREJUDICIAL TO THE PETITIONERS AS TO HAVE DENIED THEM A FAIR TRIAL.

The Sixth Amendment to the United States Constitution guarantees each defendant the right to be informed of the nature and cause of the accusation. The indictment in this case charged the defendants with conspiracy to extort monies from taverns in the police district to which they were assigned. During the trial the Government introduced evidence of a separate conspiracy between two of the defendants and some of the unindicted co-conspirators to take money from night clubs in the district. Notwithstanding the fact that the Government, pursuant to Court order, furnished a Bill of Particulars naming the taverns from whom monies were taken, the Court allowed into evidence testimony regarding other establishments not named in the indictment nor in the Bill of Particulars to establish this separate conspiracy.

A co-conspirator testified about this separate conspiracy in his direct examination which took place over two days. It was not until the conclusion of the direct examination, at a point in time when the jury was allowed to absorb most of the damaging testimony overnight, that the Court instructed the jury that such evidence was only to be considered against Captain Braasch and Sgt. Barry. The testimony of this separate conspiracy referred to as the "Big Club" took up the better part of four

days of the trial. All motions for mistrial and severance because of this evidence were denied.

Needless to say the prejudice was overwhelming. The separate conspiracy was not charged in the indictment nor mentioned in any pre-trial discovery but nonetheless the defendants were forced to sit by helplessly while the jury was inundated with testimony of another extortion scheme by other persons which was much more serious in terms of financial amounts received by the police captain and his vice-coordinator.

The Seventh Circuit in *United States* v. *Varelli*, 407 F. 2d 737 (7th Cir. 1969) reversed the conviction therein because of evidence of separate and distinct conspiracies (which were joined in the indictment) may have prejudiced the jury against the defendants not charged in both conspiracies. This Court in *Kotteakos* v. *United States*, 328 U.S. 750, we had thought, made it clear long ago that improper joinder of separate conspiracies would not be countenanced.

The Seventh Circuit in its opinion of affirmance ruled that the motive for the Captain and his vice-coordinator to have allowed the conspiracy charged in the indictment could be shown by proof of other crimes and held that the trial judge is given wide discretion to balance the probative value of the evidence against its prejudicial effect. The Court also acknowledged that such evidence has a potentially prejudicial effect but the importance of the motive evidence along with limiting instructions prevented any prejudice.

Ironically, the Seventh Circuit only a few months before in *United States* v. *Ostrowsky*, 501 F. 2d 318 (7th Cir. 1974) held that during a trial for violation of the

Dyer Act, 18 U.S.C. 2313, proof of the murder of one of the owners of one of the automobiles involved was admissible to show how the defendants came into possession of the vehicle and further that the vehicle was taken without consent. The Court held, however, that the overemphasis of the murder denied the defendants a fair trial. The Court held:

> "The evidence of the other crime need only be clear and convincing. It need not, indeed should not, involve a trial within a trial." 501 F. 2d 318 at 321.

And while the Court of Appeals in the instant case deplored the conduct of the defendants the same Court in *Ostrowsky, supra,* held that a fair trial is required for every defendant regardless of his apparent guilt or the magnitude of the crimes he may have committed.

Your four petitioners, having nothing to do with the separate and distinct conspiracy, were prejudiced irreparably by such testimony and it violated their rights to be informed of the nature and cause of the accusation.

III.

THE EVIDENCE WAS INSUFFICIENT TO CONVICT THE PETITIONER GRANA OF PERJURY AS HIS ANSWERS WERE LITERALLY TRUE.

In the Grand Jury Philip Grana was asked the following question:

> Q: "Sir, when you were in the 18th District, were you aware that at that time certain members of the vice squad were collecting money from various taverns and bars; and that the money was being split between *all* members of the vice squad?"
>
> A: "No, sir, I was not." (R. 5554)

The indictment charged that Grana testified falsely and that he denied that the money was being divided among *some* of the members of the vice squad (Count 7 of the indictment, Appendix C, infra).

Evidence which the trial established was that not all members of the vice squad received money. Therefore, Grana's statement was literally true and under the authority of *Bronston* v. *United States*, 409 U.S. 352, the defendant did not make a false declaration before the Grand Jury.

We do not contend that the question put to Grana was ambiguous or that his answer was unresponsive as the Court seems to state in its opinion (page 14). What we are saying is that he was asked about *all* of the members of the vice squad and he answered the question and the Government never proved anything to the contrary.

Because the Court of Appeals obviously misunderstood the purport of our argument, we respectfully request this Court to reverse the judgment on this Count.

IV.

PETITIONER GRANA WAS DENIED HIS RIGHT TO CONFRONTATION OF WITNESSES BY THE CONDUCT OF THE PROSECUTOR IN CLOSING ARGUMENT.

During the course of the trial a tavern owner named Sal Strazzante said that a person who said his name was Grana came to his tavern and received monies from him. When asked to identify Grana in open court the witness identified another defendant named Joseph Schillinger. The Court refused to strike the testimony of Strazzante but let it stand for what it was worth. In closing argument the following took place:

Mr. Webb (the prosecuting attorney): There was no identification of Grana in the courtroom. The identification was of Schillinger. If you look at the defendants, Grana and Schillinger as they sit in the courtroom now, you will see some similarities in their appearance.

Mr. Busch: That is objected to, your Honor.

The Court: You may proceed.

Mr. Webb: I ask you to look at Grana and look at Schillinger and there are similarities in their appearance. (R. 7048)

By asking the jury to make an identification of Grana when his own witness was unable to do so, the prosecutor was not only asking the jury to go outside of its function but was also denying Grana an opportunity to cross-examine anyone in that jury who took up the prosecutor's invitation to make the identification. It is quite possible that Grana and Schillinger looked alike to some jurors in 1973 (although there was no evidence as to how they looked in 1970 when the occurrence allegedly happened) and it is possible that other jurors may have reached other conclusions but Grana was unable to cross-examine those jurors who may have made the comparison and thereby convicted.

The only other evidence against Grana at the trial was that of an unindicted co-conspirator who said he gave money to Grana on a few occasions without any other conversation about where the money had come from or what the money was for. The jury identification which the prosecutor invited when his own witness failed to make the identification may very well have tipped the scales against petitioner Grana. Jurors are triers of the facts but they are not prosecution witnesses who can make

identification for the Government. To allow such conduct to go unchallenged goes a long way in destroying the opportunity to confront witnesses which is guaranteed by our Constitution.

CONCLUSION

For theforegoing reasons, John M. Geraghty, Philip R. Grana, Edward McGee and Mike Zakoian, respectfully move this Court to grant their petition for a writ of certiorari to review the judgment of the Seventh Circuit Court of Appeals in the instant case.

Respectfully submitted,

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Attorney for Petitioners.

APPENDIX "A"

IN THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

No. 74-1000 thru 74-1017 and 74-1105

United States of America,

Plaintiff-Appellee,

v.

Clarence E. Braasch, Edward J. Barry, John M. Geraghty, Daniel H. Armstrong, Thomas D. Batastini, Natale R. Cale, John Catalano, Martin D. Eshoo, Edward F. Finn, Carl Flagg, Philip R. Grana, Edward McGee, Emmons P. Russell, Harry R. Salvesen, Joseph A. Schillinger, Steve L. Seno, William D. Swallow, Thomas D. West and Mike Zakoian,

Defendants-Appellants.

Argued June 5, 1974 — Decided October 23, 1974

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division — No. 72 CR 979 — William J. Bauer, *Judge*

Before CLARK, *Associate Justice,** FAIRCHILD and

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*Honorable Tom C. Clark, Associate Justice (Retired) of the Supreme Court of the United States, is sitting by designation.

STEVENS, *Circuit Judges.*

CLARK, *Associate Justice.* This prosecution, brought under the extortion statute, 18 U.S.C. § 1951,[1] • • •

The indictment covers the period from 1966 to 1970 during the tenure of Captain Clarence E. Braasch as Commander of the 18th Police District and names as co-conspirators more than two dozen police officers who were attached to the 18th District during all or part of that period, including Braasch and three vice coordinators, Sergeants Fischer, Barry and Geraghty. The facts are "stranger than fiction",[2] revealing a brazen extortion scheme involving a shakedown of some 53 bars, taverns and other business establishments serving alcoholic beverages and located within the District. Initially, four police officers on the vice squad — two during daylight hours

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1. 18 U.S.C. § 1951:

(a) Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by • • • extortion or attempts or conspires so to do, • • • shall be fined not more than $10,000 or imprisoned not more than twenty years, or both.

(b) As used in this section • • •

(2) The term "extortion" means the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right.

(3) The term "commerce" means • • • all commerce between any point in a State, Territory, Possession, or the District of Columbia and any point outside thereof • • •.

2. Byron, *Don Juan*, Canto XIV, St. 101.

and two at night — collected $100 to $150 per month from each of such establishments and divided this money, known as the "package", among the members of the vice squad. The *quid pro quo* on the part of the police officers was that they would "protect" the victims of the scheme — known as the "vice club" or "little club" — from enforcement of various regulatory laws and from loss of business, revocation of licenses and other disturbances, some of which were caused by manufactured police harassment.

In the regular operation of the "little club", a vice coordinator would obtain from the police officers of the vice squad a monthly list of the establishments that might be included in the club's collections and present this list to Captain Braasch, who would then strike from it the names of those establishments that he decided should be excluded for various reasons. The resulting list contained the names of the club "members" until the next month's list was approved.

From the testimony, it appears that a similar "club" existed in the district at least as far back as 1961, but abruptly ceased operations in the middle of 1966 when Captain James Holzman was appointed District Commander. The rapid change of command from Holzman to Captain Braasch in August, 1966 marked the beginning of the conspiracy at bar.

Braasch brought with him Sergeant Robert Fischer to be his new Vice Coordinator. Soon after Braasch and Fischer began their new assignments, one Bill Gold, representing certain nightclub and gambling interests in the 18th Police District, telephoned Fischer that he wanted to see him about some business that might be of interest to him and his boss, Captain Braasch, and left his telephone

number. Fischer reported the call to Braasch, who told him to see Gold. At lunch the next day, Gold told Fischer that he would pay Captain Braasch $3,600 per month to protect gambling operations in the 18th District from police harassments and arrests, and, in addition, he would pay $1,500 per month for Braasch to protect ten specific night spots also in the 18th District.

Fischer reported to Braasch, who promptly accepted the offer. This arrangement, known as the "big ten" or the "big club", started in operation in October, 1966, and continued at least during Braasch's tenure as Commander of the 18th District, which ended in 1970. For some 27 months during the operation, Fischer acted as "bagman" for Braasch. The money was collected first from Gold and, after his death, from one Glitta, and ran as high as $6,810 a month. Initially, some of the money was passed on to key police officers, such as Braasch's friend, Barry, a group of Captains and Lieutenants, and two vice squad officers, Cello and Rifkin. The latter two were included because, as Fischer testified, "the only two vice men . . . we would have to worry about would be Rifkin and Cello because they were assigned to work gambling on day . . ."[3] Fischer

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3. After these payments Braasch and Fischer split the balance equally between themselves, except $100 which was given by Gold and Glitta to Fischer as a "tip". During the period that Fischer acted as "bagman", the total payoffs amounted to some $185,000. Braasch received in total about $85,000, and Fischer about $25,000. Barry first received $100 a month as a favor from Braasch, but later $1,000 a month when he became Vice-Coordinator; the Captains as a group received $500 a month; the Lieutenants $600 a month; and Cello and Rifkin $200 each per month.

was succeeded by Barry as "bagman" for the "big club", but the record does not show the take during that period.

In November of 1966, some of the members of the Vice Squad approached Fischer with regard to their resumption of the pre Holzman practice of collecting monies from retail liquor establishments in the District. The word about the "big club" had gone the rounds of the Vice Squad and its members were anxious to share in the proceeds. When Fischer made it clear that Braasch would not be sharing the payoffs from the "big club", it was suggested that the Vice Squad police officers organize their own "club" among the remaining bars and taverns in the District. Fischer then took this mater up with Braasch who agreed to the proposal. According to Fischer's testimony, when Braasch was apprised of the proposed "club", he commented: "I guess it is not a bad idea if these guys want to make a buck for themselves. We got our own thing going, haven't we?" Braasch's primary concern was that he have a veto power over which establishments would be included.

Braasch was interested not only in making sure that none of the nightclubs in his own "big ten" were being shaken down by the Vice Squad, but also in keeping off the list any "trouble spots" — establishments that catered to prostitutes, operated after hours, or served minors — which might prove embarrassing if the public insisted on police action. Pragmatically, Braasch and Fischer decided not to share in the proceeds of the "little club" for reasons related by Fischer in his testimony. According to Fischer, he told Braasch, when they were privately discussing the "little club" arrangement:

> [I]f there is any complaints on these places and there has to be an arrest made, why, if we weren't taking

> money from it, why we could tell them to go out and make the arrest. But if we were taking money from the thing, we would be in kind of an awkward situation. * * * So, I suggested that we don't participate, partake in any money in this and besides, "We got our own thing going and let's not get hungry."

Braasch agreed.

The original collectors for the "little club" were Cello, Rifkin, Mascolino and Napier, all of whom were Vice Squad officers, and who subsequently testified as witnesses for the Government. Toward the end of 1966 or early 1967, the members of the 18th District Vice Squad held a meeting in the 18th District station house to discuss the functioning of the extortion "club". At that meeting, the officers discussed the procedures to be followed in protecting their "club" members; they discussed the amount of money that would be paid to each vice officer as more bars were recruited; and they discussed which officers would be responsible for collecting the money on each shift.

While Fischer and Barry were Vice Coordinators, Officers Cello, Rifkin, Mascolino, and Napier distributed the money they collected from the bars among the members of the Vice Squad. Cello, Mascolino, Rifkin, and Napier each received approximately $300 and later $500 per month; the other vice men received $150 and later $250 per month as their share of the "package."

Witness Cello testified in the Governmen's case-in-chief that the conditions for membership were as follows:

> The conditions were that they would pay $100 a month to the vice officer that would be collecting. In return, there would be no harassment by members of the vice squad. Under harassment, it would be classified as premise checks, I.D. checks of individuals in

the bars. If it was a gay bar, you would not go in there with flashlights and harass the patrons of the bar. You would assist them in any trouble that they have. If you were assigned to make a followup report, in your followup report you would try to make it or slant it in any way or form that would help the tavern owners.

If you received knowledge that there was — any knowledge or any information that VCD was going to come into the district to make a raid on these taverns, you would forewarn them. Also that none of the vice — there would be no individual shakedowns by any individual vice officer on these taverns if a check had to be made on a tavern, it would be checked out first with one of us.

As the years from 1966 to 1970 went on, other Vice Squad officers assisted in the collection tasks for the "little club". In February, 1967, Fischer was promoted and transferred to other duties outside the 18th District, and Barry succeeded him as Vice-Coordinator. Barry took over the duties of intermediary between the "little club" and Braasch, but he received no money from the "little club" operation, his take being the $1,000 heretofore mentioned from the "big club". As indicated above, however, Fischer continued as "bagman" for the "big club" through January, 1969. In 1970, Sergeant Geraghty succeeded Barry as Vice-Coordinator and continued to perform the same services as the latter, except that Geraghty assumed the monthly responsibility of personally receiving the "package" collected from the "little club" and distributing it among the members of the Vice Squad.

A. *The Indictment and Trial:*

On December 29, 1972, a sixteen-count indictment was returned against twenty-four Chicago police officers, charg-

ing in the first count that they participated in a conspiracy to commit extortion in violation of 18 U.S.C. § 1951 by extracting money under color of official right from the proprietors of the fifty-three liquor establishments comprising the "little club". The remaining fifteen counts of the indictment charged separate violations of 18 U.S.C. § 1623.[4] Each count separately charged one of those named

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4. 18 U.S.C. § 1623 in relevant part provides:

> (a) Whoever under oath in any proceeding before or ancillary to any court or grand jury of the United States knowingly makes any false material declaration or makes or uses any other information, including any book, paper, document, record, recording, or other material, knowing the same to contain any false material declaration, shall be fined not more than $10,000 or imprisoned not more than five years, or both.
>
> (c) An indictment or information for violation of this section alleging that, in any proceedings before or ancillary to any court or grand jury of the United States, the defendant under oath has knowingly made two or more declarations, which are inconsistent to the degree that one of them is necessarily false, need not specify which declaration is false if—
>
> (1) each declaration was material to the point in question, and
>
> (2) each declaration was made within the period of the statute of limitations for the offense charged under this section.
>
> In any prosecution under this section, the falsity of a declaration set forth in the indictment or information shall be established sufficient for conviction by proof that the defendant while under oath made irreconcilably contradictory declarations material to the point in question in any proceeding before or ancillary to

in Count One with making false material declarations to the Grand Jury by appearing before the Grand Jury and falsely denying his participation in the "little club" extortion scheme.[5]

At the trial before Judge William J. Bauer which began on August 13, 1973, the Government presented the testimony of seven police officers who had formerly been assigned to the 18th Police District. Five of them — Fischer, Cello, Rifkin, Mascolino and DuShane — testified under immunity granted pursuant to 18 U.S.C. § 6002; the sixth, Anthony Corsentino, testified without immunity; and the seventh, Lowell Napier, one of those originally indicted, pled guilty before trial and testified. These officers testified to their own complicity in the "little club" and to the involvement of those on trial. In addition, 48 witnesses were produced by the Government who were owners or employees of the liquor establishments in the "little club"; who testified under a blanket immunity grant, and who

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any court or grand jury. It shall be a defense to an indictment or information made pursuant to the first sentence of this subsection that the defendant at the time he made each declaration believed the declaration was true.

5. Of the twenty-three defendant who went on trial, eight were charged only in Count One (conspiracy); Police Sergeant Barry, Police Officers Cale, Catalano, Finn, McGee, Salveson, Seno, and Zakoian. The remaining fifteen were charged in Count One and in one of the fifteen individual counts of false declarations to the Grand Jury: Police Captain Braasch, Police Sergeant Geraghty, Police Officers Armstrong, Batastini, Demke, Eshoo, Flagg, Grana, Lazar, Pierson, Russell, Schillinger, Swallow, Troche, and West.

asserted that they had personally made payments to the police officers who were collecting extortion money for the Vice Squad. The trial was concluded on October 3rd, and the jury found nineteen defendants involved in the instant appeal guilty, and found four others — Demke, Lazar, Pierson and Troche — not guilty on all charges.

We have read the 6,836-page record and find that it reveals a carefully organized and skillfully operated extortion machine of massive proportions in both membership as well as monetary "take", which operated over several years and corrupted the entire Vice Squad of the 18th Police District, including its top officials. The testimony of the 48 proprietors and employees of the participating "little club" members established that the extortion payments were made. The testimony of the bagmen Cello, Rifkin, Mascolino and Napier confirmed that they had received the payments and disbursed them to police officers of the Vice Squad as well as to themselves. The testimony of DuShane, who was the police officer assigned to clerical work in the Vice Squad, detailed fiscal arrangements. And the testimony of Fischer explained the organization of the "little club"; why certain officers, such as Cello and Rifkin, were included in the payoff of both the "little" and "big" clubs; and the intimate conversations that he had with Braasch that tied the latter inextricably to the "little club" conspiracy and revealed the depths of venality to which Braasch would stoop to protect his "own thing"— the "big club".[6]

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6. Exclusive of the "big club" evidence pertaining to the motivation of Captain Braasch and his various vice coordinators, a number of factors connect each of the remaining appellants to the conspiracy. First, most of them

B. *The Issues Tendered Here:*

The appellants raise the following issues, some sixteen in number:

(1) Were the statutory requirements of 18 U.S.C. § 6001 *et seq.* met in granting immunity to various Government witnesses;

(2) Was it proper for the trial court to have suppressed the orders granting such immunity;

(3) Was the grand jury process abused by calling certain prospective Government witnesses before the grand jury after the indictment was returned;

(4) Did the re-assignment of the case to another judge several weeks before trial but after completion of pre-trial motions violate appellants' constitutional protections;

(5) Did the conspiracy "affect commerce" within the meaning of 18 U.S.C. § 1951;

(6) Was knowledge and intent sufficiently proven;

(7) Was the evidence sufficient to prove Braasch's participation in the conspiracy;

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received a monthly share of the "package" after joining the District Vice Squad; second, many participated in the actual collecting of money from the victim bars; third, some participated in the distribution of the "package"; fourth, some names appeared on a list indicating that they received a share for one month in early 1967; and, fifth, some officers attended the Vice Squad meeting in late 1966 or early 1967 at which the "club" and the "package" were discussed at length. The evidence at trial from the representatives of the bars and taverns as well as that from Fischer, Rifkin, Cello, and the other officers who testified for the Government tied each of the appellants to one or more of these factors.

(8) Was the evidence sufficient to prove that Grana's declarations before the Grand Jury were false;

(9) Was the admission of the evidence as to the "big club" improper as to Braasch and Barry and so highly prejudicial to the other appellants as to have denied them a fair trial;

(10) Were the twenty-four defendants and sixteen counts properly joined in the indictment;

(11) Does a police officer's abuse of the power of his official position in order to obtain payments from merchants come within the meaning of 18 U.S.C. § 1951's ban on extortion "under color of official right".

(12) Was it proper to admit evidence of a similar extortion scheme within the 18th District antedating the conspiracy at bar;

(13) Was it proper to admit evidence showing the state of mind of the extortion victims;

(14) Did other evidentiary rulings result in prejudice to the appellants;

(15) Did the prosecutor's closing argument constitute reversible error because of his references to the evidence tying appellant Grana to the conspiracy; and

(16) Was there an abuse of discretion in the sentences imposed.

The bulk of these issues are either frivolous or controlled by previous decisions and do not merit extended discussion. We will deal with them in the order above outlined.

C. *Disposition of the Issues:*

I.

Appellants claim that the Government failed to comply with 18 U.S.C. § 6002 which, they argue, requires that a witness actually refuse to testify before being granted immunity. Unfortunately for the success of their claim, 18 U.S.C. § 6003 (b) (2) specifically authorizes the Government to seek such a grant where the witness "has refused *or is likely to refuse* to testify or provide other information on the basis of his privilege against self-incrimination." (Emphasis supplied) Appellants also claim that the trial court's immunity orders were too broad, prohibiting the use of the immunized testimony against bar owner-witnesses not only in criminal trials but also in subsequent state administrative proceedings, such as liquor license revocation hearings. However, we need not pass on this difficult question since appellants have no standing to raise the question. *United States* v. *Lewis*, 456 F. 2d 404, 410 (3d Cir. 1972); *United States ex rel. Berberian* v. *Cliff*, 300 F. Supp. 8, 14 (E.D. Pa. 1969). *Cf. Lopez* v. *Burke*, 413 F. 2d 992, 994 (7th Cir. 1969).

II.

Appellants further claim that suppression of the orders granting immunity to several dozen bar owners violated their Sixth Amendment right to the effective assistance of counsel by being denied important information. The suppression orders were entered by Chief Judge Edwin A. Robson in March of 1973, "[i]n order to encourage further disclosures and in order to protect the personal safety

and security of the informers and potential witnesses by concealing their identity." Since, as we have said, a defendant has no standing to contest the propriety of a grant of immunity, it follows that appellants had no right to be present at the immunity hearings nor any right to obtain the identity of Government witnesses by or through being furnished copies of the orders granting immunity. Chief Judge Robson denied appellants' motions to lift the suppression order and we agree with his conclusion on the matter. It also follows that defense counsel had no right to be at the immunity hearings. *Cf. United States* v. *Bennett*, 409 F. 2d 888, 899 (2d Cir.), cert. den. sub. nom *Haywood* v. *United States*, 396 U.S. 852, (1969), holding that defense counsel's presence is not required when a prosecutor interrogates a prospective witness in preparation for trial. Moreover, no possible prejudice could have arisen since a copy of the immunity orders was provided the defense with the Section 3500 material at the conclusion of the direct examination of the first immunized witness and was used by appellants' counsel in cross-examination.

III.

Appellants next complain that the Government abused the grand jury process by calling prospective witnesses before the Grand Jury for the purpose of preparing an already pending indictment for trial. The short answer is that the Government even when the evidence received may also relate to a pending indictment. *Beverly* v. *United States*, 468 F. 2d 732, 742 (5th Cir. 1972). Appellants have shown no prejudice from these occurrences and their contention must fail. *United States* v. *Star*, 470 F. 2d 1214, 1217 (9th Cir. 1972).

IV.

Appellants next claim that their constitutional protections were violated because of the transfer of the case to another judge. This is frivolous. A litigant does not have a right to have his case heard by a particular judge. *United States* v. *Dichiarinte*, 385 F. 2d 333, 337 (7th Cir. 1967), cert. den., 390 U.S. 945 (1968); *United States* v. *Stone*, 411 F. 2d 597, 598-9 (5th Cir. 1969). The fact that the original judge decided pretrial motions is of no consequence. In central calendar courts that is done every day. *United States* v. *Marachowsky*, 213 F. 2d 235, 244 (7th Cir. 1954), clearly approves the action of one judge sitting for another to make any order necessary to preserve the rights of the parties.

V.

Appellants also challenge the technical sufficiency of the Government's proof that their conduct "affects commerce" within the meaning of 18 U.S.C. § 1951. At the outset we note that there were no objections to the trial court's instructions as to what constitutes effect on commerce. Section 1951 proscribes extortion which "in any way or degree obstructs, delays or affects commerce or the movement of any article or commodity in commerce . . ." As this Circuit held in *United States* v. *De Met*, 486 F. 2d 816 (7th Cir. 1973), cert. denied, 94 S. Ct. 1991 (1974):

> Because Congress has seen fit to exercise its full power under the commerce clause, extortionate conduct having an arguably *de minimus* effect on commerce may nevertheless be punished. [486 F. 2d at 821]

The record indicates that representatives of eleven Chicago area wholesale distributors of beer and liquor testified as to their purchases of alcoholic beverages from numerous

locations outside the state and six other wholesale distributors were included by stipulation. Voluminous sales and purchase records of the establishments in the "little club" were admitted into evidence. The dependence of the Chicago retail liquor establishments upon interstate commerce for a supply of alcoholic beverages was fully covered by the testimony of the Chief of Technical Services Branch of the Office of the Regional Director of the Mid West Region of the Alcohol, Tobacco and Firearms Bureau. It revealed a limited number of distilleries and wine manufacturers located in the State of Illinois during the period covered by the conspiracy. This proof shows that the impact on interstate commerce was substantial rather than *de minimis*. Nor is there merit to the further contention that the warehousing of the alcoholic beverages prior to sale severs the interstate nexus. *See United States* v. *Gill*, 490 F. 2d 233, 236 (7th Cir. 1973).

VI.

Appellants also claim that they did not know of either the extortionate nature of the conspiracy, the source of the money they received, or the interstate impact of their involvement. It may well be that each of the appellants did not know of the minute details of the operation of the "little club", but once the conspiracy was established — the evidence of which was overwhelming — slight evidence is sufficient to connect a particular participant. *See United States* v. *Robinson*, 470 F. 2d 121, 123 (7th Cir. 1972); *United States* v. *Marrapese*, 486 F. 2d 918, 921 (2d Cir. 1973); *United States* v. *Nunce*, 483 F. 2d 453, 460 (9th Cir. 1973). Each of the appellants were Chicago police officers assigned to the vice squad, except Braasch, who

was their boss; each received money every month from the "little club" operation, except Braasch, Fischer and Barry; they knew the money was not due them or their office by reason of their official position; the record directly connects most of the officers with the fact that the money came from the liquor establishments since four of them were collectors of it and others were present when money was collected: Armstrong, Batastini, Catalano, Eshoo, Finn, Flagg, Grana, Russell, Salvesen and Seno; the operation of the club was freely discussed among the vice officers; Barry was told all about it when he first became Vice-Coordinator: a meeting of the Vice Squad members was held in the 18th District Police Station for the purpose of discussing the "little club"; and Officer DuShane testified that he had conversations about the "little club" with every vice officer assigned to the District during the time in question. Moreover, during the entire relevant period — 3½ years — only three arrests were made by the Vice Squad officers at the 53 bars that were in on the "little club", and after March, 1967, not a single arrest was made by any member of the Vice Squad. In our view the evidence was overwhelming.

VII.

In arguing the insufficiency of the evidence to support his conviction, Braasch specifically attacks the credibility of Fischer. That, of course, was a matter the jury decided against Braasch, and we have no power to set aside their determination on the point. Besides, Fischer was corroborated in large part by Cello, Rifkin, and Napier.

VIII.

Grana claims that the Government failed to prove beyond a reasonable doubt that he made false declarations to the Grand Jury as alleged in Count Seven, relying on *Bronston* v. *United States*, 409 U.S. 352 (1972). But that case is not apposite, since it involved an ambiguous question and a true but unresponsive answer. The questions put to Grana were not ambiguous, nor were his answers unresponsive. Indeed, the latter were unequivocal negative responses to questions probing his knowledge of and participation in the extortion scheme.

IX.

As we have indicated in our factual resumé, the Government introduced evidence concerning a "big club" payoff that was not alleged in the indictment. It was introduced solely for the purpose of establishing intent and motive as to Braasch and Barry's participation in the "little club" conspiracy and the trial court so advised the jury with carefully worded instructions. Braasch and Barry, who received none of the proceeds from the "little club", assert that the jury was so inflamed by this evidence that it convicted them for that crime rather than the one charged in the indictment. The remaining appellants also claim prejudice and assert that the jury was confused by the introduction of this separate and uncharged conspiracy into the case. In response, the Government asserts that Fischer's role as Braasch's "bagman" for the "big club" payoffs—a role later undertaken by Barry—was absolutely necessary to paint the whole picture of the "little club" operation and to explain the motive of Braasch,

Fischer, and Barry in approving its organization. Since Braasch and his Vice Coordinators had their "own thing going", it was necessary to protect that operation, i.e., the "big club". By examining the monthly lists of establishments in the "little club" which were submitted for his approval, Braasch was able to make certain that there would be no conflict between the two operations. Moreover, the record shows that word of the "big club" had gone the rounds of the Vice Squad and there was dissatisfaction because the Vice Squad was not in on the take. It is a reasonable inference that Braasch concluded that unless he took steps to satisfy the Vice Squad, this dissatisfaction would increase as time passed and disclosure of the "big club" would inevitably result.

It is well-established that proof of motive is one of the exceptions to the general rule that evidence of "other crimes" not charged in the indictment is inadmissible in the prosecution's case-in-chief. *See United States ex rel. Durso* v. *Pate*, 426 F. 2d 1083, 1086 (7th Cir. 1970), cert. denied, 400 U.S. 995 (1971). As in most questions regarding the admissibility of evidence, trial judges are given wide discretion to balance the proffered item's probative value against its prejudicial effect. *See United States* v. *Gaus*, 471 F. 2d 495, 499 (7th Cir.), cert. denied, 412 U.S. 938 (1973). We can see no abuse of discretion here.

True it is that detailed evidence as to a similar, contemporaneous conspiracy has a potentially prejudicial effect, but here that effect was outweighed by the importance of this motive evidence as well as the District Court's cautious and thorough limiting instructions which were delivered to the jury not only at the conclusion of witness Fisher's direct examination, but again after witnesses Cello and Murphy testified briefly as to their involvement

in the "big club", and for a third time in the final charge to the jury. These instructions specified that the "big club" evidence was not to be used against any other of the defendants besides Braasch and Barry, and as to them it was only to be considered as it relates to their motive and intent to participate in the "little club" conspiracy charged in the indictment. We have no reason to doubt the effectiveness of these carefully drawn instructions. *See United States* v. *Pauldino*, 443 F. 2d 1108, 1114 (10th Cir.), cert. denied, 404 U.S. 882 (1971). The jury verdict — in which four of the twenty-three defendants were acquitted — itself supports this conclusion.

Appellant Braasch additionally claims that his constitutional right to be informed of the nature and cause of the accusation against him, guaranteed by the Sixth Amendment, was infringed by the omission of any mention of the "big club" in the indictment. The right to be informed of the accusation is a central right in our constitutional system, but it does not place a limitation on the evidentiary rule which allows the introduction of "other crimes" evidence in the proper circumstances. *Cf. McConkey* v. *United States*, 444 F. 2d 788, 789 (8th Cir.), cert. denied, 404 U.S. 885 (1971). Here the Government notified counsel for Braasch on August 27th, some two weeks before Fischer testified — and weeks before it closed its case — that it would introduce just such evidence pertaining to his involvement in uncharged criminal conduct in order to prove his motive for participating in the "little club". *United States* v. *Baum*, 482 F. 2d 1325 (2d Cir. 1973), on which appellant Braasch relies, is therefore distinguishable since appellant had both notice and opportunity to meet the Government's proof of concurrent criminal conduct.

X.

Appellants argue that it was prejudicial under Fed. R. Crim. P. 14 to join the conspiracy count which names all of the 24 conspirators, with the 15 separate perjury counts, each of which named a single conspirator. They rely on the panel opinion in *United States* v. *Pacente*, 490 F. 2d 661 (7th Cir. 1973), which reversed the convictions of a Chicago police officer on a similar indictment charging both extortion and perjury. Since the time that briefs were submitted in the present case, however, an *en banc* reconsideration of the *Pacente* opinion has resulted in its reversal, *United States* v. *Pacente*, No. 72-1988 (7th Cir., filed August 6, 1974), so that such a joinder has now been given full approval by this circuit. Moreover in the instant case, the trial judge in his charge specifically instructed the jury to give separate consideration to each count and to render separate verdicts on each defendant. The charge admonished the jury further that each defendant was entitled to have his guilt or innocence determined from his own conduct and from the evidence as applied to him as if he were being tried alone and that the guilt or innocence of any one defendant should not influence the jury's verdict respecting the others. Further, with regard to the perjury counts, the charge instructed that testimony introduced as to them was to be considered only as evidence of the false material declaration charge and that the jury should not consider that testimony as evidence of any defendant's guilt as to Count One of the indictment. The fact that the jury found four of the defendants not guilty on both the conspiracy and the respective perjury counts showed that they not only knew what they were doing but did what they intended. *See United States* v. *Gill*, 490 F. 2d

233, 239 (7th Cir. 1973). We add that the massive duplication of effort entailed in separate trials is not justified absent a more specific claim of prejudice than the one now urged by appellants. *Cf. United States* v. *Haim*, 218 F. Supp. 922, 932 (S.D. N.Y. 1963); *United States* v. *Verra*, 203 F. Supp. 87, 90 (S.D. N.Y. 1962).

Some of the appellants contend that the joinder of so many defendants in a single indictment deprived them of the privilege of calling a co-conspirator to the stand to testify in their behalf. None of the appellants, save Braasch, attempted to make any positive showing of either the utility or the availability of such testimony. As this circuit has held again and again "[t]he unsupported possibility that such testimony might be forthcoming does not make the denial of a motion for severance erroneous". *United States* v. *Kahn*, 381 F. 2d 824, 841 (7th Cir.), cert. den., 389 U.S. 1015 (1967). Braasch claims that his co-defendant Barry could have testified that Fischer (the Government's star witness against Braasch) told Barry that he (Fischer) had denied to the Government any involvement in any extortion scheme, stating to Barry further: "They [the prosecutors] want Braasch and the only way I could give them Braasch is to lie". However, when the trial judge held an in-chambers *voir dire* on the matter, Barry invoked the Fifth Amendment and refused to answer all questions, including whether he would testify on behalf of Braasch in a separate trial if severance was granted. The facts here are, therefore, a far cry from the leading case of *United States* v. *Echeles*, 352 F. 2d 892 (7th Cir. 1965), where a co-defendant repeatedly offered to give obviously exculpatory testimony. Barry's refusal to give such assurance left Braasch without that one element which

was essential to his motion for severance. *See United States* v. *Johnson,* 426 F. 2d 1112, 1116 (7th Cir. 1970); *United States* v. *Caci,* 401 F. 2d 664, 672 (2d Cir. 1968).

XI.

The appellants assert that the crime, if any, charged and proven here is not cognizable under the provisions of the Hobbs Act utilized in the indictment, i.e., extortion "under color of official right". Extortion "under color of official right" as used in the Act, they say, means either the acceptance of money by a public official to perform an act that he was already under a legal duty to perform or, alternatively, the taking of money under a claim by the officer that he had an official right to the money by virtue of his office. Here, they urge, the proof showed only that the appellants took money to refrain from performing their duties and thus their conduct could not be included in the statutory phrase "under color of official right", but instead "constitutes classic bribery", citing *People* v. *Dioguardi,* 8 N.Y. 2d 260, 203 N.Y.S. 2d 870 (1960), and other New York cases. Pursuing this line of argument, appellants contend that there was a fatal variance between indictment and proof since the conduct proved did not fall within the "official right" extortion charged and the Government failed to charge them with the other type of extortion covered by the first clause of 18 U.S.C. § 1951 (b)(2) —extortion by the wrongful use of actual or threatened force, violence or fear.

Appellants, however, overlook the fact that the evidence shows that the conspirators used the power and authority vested in them by reason of their office to obtain money not due them or due the office. The use of office to obtain

payments is the crux of the statutory requirement of "under color of official right", and appellants' wrongful use of official power was obviously the basis of this extortion. *See United States* v. *Staszcuk*, No 73-1869 (7th Cir., filed Sept. 10, 1974). It matters not whether the public official induces payments to perform his duties or not to perform his duties, or even, as here, to perform or not to perform acts unrelated to his duties which can only be undertaken because of his official position. So long as the motivation for the payment focuses on the recipient's office, the conduct falls within the ambit of 18 U.S.C. § 1951. That such conduct may also constitute "classic bribery" is not a relevant consideration.[7]

The police officers of the vice squad harassed bars, taverns and liquor establishments through their official position by making unusually frequent premise checks (four times a day) and identification examinations of patrons; they inspected bars catering to homosexuals with flashlights and harassed the patrons; they individually "shook down" proprietors often; they set-up under-aged drinkers in bars in order to frame a violation of law; and they sent liquor licensing authorities false reports about bars, resulting in cancellations. In short, a set of roving police officers preyed upon the vulnerable position of the bars in the 18th District for their own profit. The proprietors wished to stop this sort of harassment, and the payment of "protection" money appeared to be the only answer. It may be

---

7. As appellants themselves point out, "the modern trend of the federal courts is to hold that bribery and extortion as used in the Hobbs Act are not mutually exclusive. *United States* v. *Kahn*, 472 F. 2d 272, 278 (2d Cir. 1973), *cert. den.*, 411 U.S. 982, 93 Sup. Ct. 2270."

that some of the payments were made from fear of economic harm, which does come within the type of coercive extortion prohibited by the first clause of 18 U.S.C. § 1951 (b)(2) and not by the clause relating to extortion "under color of official right".[8] Nevertheless, it was appellants' misuse of the power of their office that triggered the harm as well as the payments in this case and made it the type of extortion charged in the indictment. We must, therefore, reject their contention.

---

8. It may be true that duress is an essential element of a case prosecuted under the provision of the Hobbs Act relating to "wrongful use of actual or threatened force, violence or fear", but coercive extortion is not the only type outlawed by the Act. The other is inducing payoffs "under color of official right"; and that offense does not require proof of coercion. Few cases have dealt with the distinction between these offenses, but several are relevant. *See United States* v. *Kenny*, 462 F. 2d 1205 (3d Cir.), cert. den., 409 U.S. 914 (1972). *See also United States* v. *Nardello*, 393 U.S. 286 (1969) (Warren, C. J.) (discussing labels and classification of extortion offenses by the states); *Bianchi* v. *United States*, 219 F. 2d 182, 193 (8th Cir.), cert. den., 349 U.S. 915 (1955); *United States* v. *Sutter*, 160 F. 2d 754, 756 (7th Cir. 1947); *United States* v. *Hyde*, 448 F. 2d 815, 832-4 (5th Cir. 1971), cert. den., 404 U.S. 1058 (1972); *United States* v. *Pranno*, 385 F. 2d 387, 390 (7th Cir. 1967), cert. den., 390 U.S. 944 (1968); *United States* v. *De Met*, 486 F. 2d 816, 823 (7th Cir. 1973) (Swygert, C. J., concurring). Here, the Congress intended to and did exercise all of its power under the Constitution, and the Act is to be construed broadly. *United States* v. *Pranno*, 385 F. 2d at 389. *See also* Stern, "Prosecutions of Local Political Corruption Under the Hobbs Act: The Unnecessary Distinction Between Bribery and Extortion"; 3 Seton Hall L. Rev. 1 (1971).

CONCLUSION

We have carefully considered the remaining issues raised by appellants regarding admissibility of background, state of mind and other evidence, the prosecutor's closing argument, and the trial judge's sentencing of appellants. We find these claims without merit and therefore affirm the judgment.

AFFIRMED.

A true Copy:

Teste:

_____

Clerk of the United States Court of Appeals for the Seventh Circuit

APPENDIX "B"

UNITED STATES COURT OF APPEALS

For the Seventh Circuit

Chicago, Illinois 60604

November 21, 1974

Before

Hon. TOM C. CLARK, Associate Justice

Hon. THOMAS E. FAIRCHILD, Circuit Judge

Hon. JOHN PAUL STEVENS, Circuit Judge

No. 74-1000 thru
74-1017 and 74-1105

UNITED STATES OF AMERICA, Plaintiff-Appellee, vs. CLARENCE E. BRAASCH, et al., Defendants-Appellants.	Appeal from the United States District Court for the Northern District of Illinois, Eastern Division (72 CR 979)

This matter comes before the court on the five separate petitions for rehearing filed herein by various defendants-appellants. They are:

The "Petition For Rehearing en banc" filed herein on November 5, 1974 by counsel for defendants-appel-

lants Natale Cale, John Catalano, Edward Finn, Harry Salvesen, Steve Seno and William Swallow;

The "Petition For Rehearing On Behalf of Appellants Daniel Armstrong, Thomas Batastini, Martin Eshoo, Carl Flagg, Emmons Russell, Joseph Schillinger and Thomas West" filed herein on November 6, 1974;

The "Petition For Rehearing en banc" filed herein on November 6, 1974 by defendant-appellant Edward J. Barry, pro se;

The "Petition For Rehearing En Banc by Defendant-Appellant Clarence E. Braasch" filed herein on November 7, 1974. And

"Petition For Rehearing On Behalf Of Edward McGee, Philip R. Grana, John M. Geraghty And Mike Zakoian", which requests en banc consideration on page eleven thereof, filed herein on November 7, 1974.

No judge in active service has requested a vote thereon, and no judge has voted to grant the suggestion for en banc consideration. All the members of the panel have voted to deny rehearing in each of the aforesaid petitions. On consideration whereof,

IT IS ORDERED that all five of the petitions for rehearing filed herein be, and they are hereby, DENIED.

NOTE: Judge Philip W. Tone disqualified himself from consideration of any of these petitions.

APPENDIX "C"

COUNT VII

The Special February 1971 Grand Jury further charges:

1. On October 24, 1972, at Chicago, in the Northern District of Illinois, Eastern Division.

PHILIP R. GRANA,

defendant herein, while under oath as a witness before the Special September 1972 Grand Jury of the United States of America, duly impaneled and sworn in the United States District Court for the Northern District of Illinois and inquiring for said district in a case then and there pending before the said Grand Jury, did knowingly make false material declarations.

2. At the time and place aforesaid, the said Grand Jury inquiring as aforesaid was conducting an investigation pertaining to possible violations of the criminal laws of the United States, to wit, among others, Section 1951 of Title 18, United States Code.

3. During the course of the investigation by the said Grand Jury it became and was material for the said Grand Jury to determine: whether the defendant Philip R. Grana, while employed as a Chicago police officer in the 18th Police District, had ever received any money from another Chicago police officer, knowing that the money originated with a bar, tavern or other business establishment serving alcoholic beverages; whether the defendant Philip R. Grana, while employed as a Chicago

police officer in the 18th Police District, had knowledge that certain members of the 18th Police District vice squad were collecting money from bars, taverns or other business establishments serving alcoholic beverages; and whether the defendant Philip R. Grana had knowledge that this money was then being divided among other members of the 18th Police District vice squad.

4. At the time and place aforesaid, the defendant Philip R. Grana, while under oath, did knowingly declare in substance before the said Grand Jury with respect to the aforesaid material matters that while employed as a Chicago police officer in the 18th Police District, he had never received any money from another Chicago police officer, knowing that the money originated with a bar, tavern or other business establishment serving alcoholic beverages; that while employed as a Chicago police officer in the 18th Police District, he had no knowledge that certain members of the 18th Police District vice squad were collecting money from bars, taverns or other business establishments serving alcoholic beverages; and that he had no knowledge that this money was then being divided among other members of the 18th Police District vice squad.

5. The aforesaid declarations by the defendant Philip R. Grana were false and known by him to be false when made in that while employed as a Chicago police officer in the 18th Police District, he did receive money from Chicago police officer Edward Rifkin, knowing that it originated with a bar, tavern or other business establishment serving alcoholic beverages; that while employed as a Chicago police officer in the 18th Police District, he did have knowledge that Chicago police officer Edward

Rifkin of the 18th Police District vice squad was collecting money from bars, taverns and other business establishments serving alcoholic beverages; and that he did have knowledge that this money was being divided among other members of the 18th Police District vice squad;

In violation of Title 18, United States Code, Section 1623.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-782

CLARENCE E. BRAASCH,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No.

CLARENCE E. BRAASCH,

Petitioner,

VS.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States.

Clarence E. Braasch, the petitioner herein, prays that a writ of certiorari issue to review a judgment of the United States Court of Appeals for the Seventh Circuit affirming his conviction of both conspiracy to commit extortion and making a false declaration before a federal grand jury.

OPINION BELOW

The opinion of the court of appeals (Appendix A, *infra*) is not yet reported.

JURISDICTION

The judgment of the court of appeals (Appendix B, *infra*, p. 22a) was entered on October 23, 1974. A timely petition for rehearing *in banc*, by petitioner herein, was denied on November 21, 1974 (Appendix C, *infra*, p. 23a). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

The first question pertains to the admission of massive particularized evidence of a conspiracy not charged in the indictment, and is presented for review in several subdivisions:

(1) whether excessive details of the uncharged "Big Club" conspiracy, virtually the only evidence connecting Clarence E. Braasch to the charged "little

club" conspiracy, created such a danger of unfair prejudice and issue confusion that exclusion thereof was mandatory;

(2) whether, in view of the total dependence of this petitioner's conviction upon the excessive details of the uncharged "Big Club" conspiracy, this petitioner was denied his right to be tried only on charges presented in an indictment returned by a grand jury; and

(3) whether the actions of the government, in stating before trial that, apart from the 53 taverns named in the indictment, ". . . the only other retail liquor establishment that the government intends to introduce evidence about is the Scotch Mist, 874 North Wabash, Chicago, Illinois" (R. 157, p. 4), and in reversing its position at trial, without genuine advance notice, through the 4-day testimony of former police lieutenant Robert W. Fischer (the 57th of its 61 case-in-chief witnesses, without whom there was no provable connection between the charged conspiracy and this petitioner) about the uncharged "Big Club" conspiracy, were inconsistent with fundamental fairness and denied this petitioner his right to due process of law, as well as his right to be informed of the nature and cause of the accusation.

The second question presented for review is whether this petitioner, charged in the indictment with both conspiracy to commit extortion and making a false declaration before a federal grand jury, was entitled to (a) separate trials of the 2 counts and/or (b) a severance from 14 of his codefendants each charged with the identical 2 offenses.

CONSTITUTIONAL PROVISIONS INVOLVED

Amendments V and VI of the Constitution of the United States provide in relevant part:

AMENDMENT V

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury (with inapplicable exceptions], nor shall any person . . . be deprived of life, liberty, or property, without due process of law. . . ."

AMENDMENT VI

"In all criminal prosecutions, the accused shall enjoy the right . . . to be informed of the nature and cause of the accusation. . . ."

STATEMENT

The consolidated jury trial of this petitioner (hereinafter sometimes "Braasch") and 22 of his former fellow officers of the Chicago Police Department, in the United States District Court for the Northern District of Illinois, upon a 16-count indictment (one conspiracy count and 15 false grand jury declaration counts), after evidence that commenced August 13, 1973, was submitted to the jury on the afternoon of October 3, 1973 (Tr. 7565), and 2 days later the jury returned 38 verdicts: 19 defendants were found guilty and 4 defendants not guilty upon Count I (the conspiracy count), while 11 defendants were also found guilty, and the same 4 defendants not guilty, upon the

15 false declaration counts (Tr. 7640-7650). This petitioner was found guilty of both conspiracy to commit extortion (Count I) and making a false declaration before a federal grand jury (Count XV) (Tr. 7640). This petitioner was sentenced to consecutive prison terms of 5 years (Count I) and one year (Count XV) (R. 347). The court of appeals affirmed this petitioner's conviction (Appendix, *infra*).

Count I of the indictment (R. 1), charging a conspiracy to commit extortion (18 U.S.C. 1951), identified 53 retail liquor dealers in Chicago's 18th Police District (par. 4), named Braasch as that district's commander from August, 1964 until May, 1970 (par. 1), alleged the movement of liquor in interstate commerce (par. 5) and charged a conspiracy among Braasch and 27 others (all of whom, except Braasch, were at one time or another members of the 18th Police District vice squad) to commit extortion, commencing in August, 1966 and affecting commerce, in that Braasch and the 27 others wrongfully used their positions as police officers to cause money to be obtained from the 53 named retail liquor dealers, through consent induced under color of right, for distribution among members of that vice squad. Count XV charged Braasch with 4 false material declarations on December 20, 1972 before the federal grand jury that returned the 40-page indictment on December 29, 1972: (1) that he was not told of the vice squad plans for collections from taverns; (2) that the taverns were never identified to him; (3) that he never approved the vice squad plans; and (4) that he had no knowledge of the actual vice squad collections.

Trial

At trial it was undisputed that no part of the vice club or "little club" collections was ever distributed to or re-

ceived by Braasch. Since it was the testimony of Robert W. Fischer that alone joined Braasch to the "little club" conspiracy charged in the indictment, and since this petition is premised in part upon excessive evidence of the uncharged conspiracy, the testimony of Fischer is hereinafter reviewed at length. Fischer was a sergeant and the vice coordinator of the 18th Police District from September, 1966 until his promotion to lieutenant during March, 1967, after which he was briefly detailed to the police training division and then given command of Area 5 Auto Theft (Tr. 4383, 4387, 4429-4431). In mid-November, 1966, Fischer met with 2 members of his vice squad, Edward Rifkin and John ("Skippy") Cello; Rifkin mentioned that ". . . things had been tough for the bar owners . . ." under Holzman (whom Braasch replaced in August, 1966) and proposed a monthly collection from taverns in the 18th Police District, for distribution among members of the vice squad, in exchange for freedom from harassment and petty arrests by vice officers, with 4 volunteered collectors: Rifkin and Cello by days and Napier and Mascolino by nights (the four, with Fischer, were the major government witnesses) (Tr. 4388-4391). Fischer told Rifkin he would find out, and a few minutes later he repeated the proposal to Braasch in his office (Tr. 4390-4393). After requesting that Fischer procure a list of the taverns, Braasch added (Tr. 4394; emphasis added):

> "'. . . I guess it is not a bad idea if these guys want to make a buck for themselves.' He said, '*We got our own thing going,* haven't we?'
>
> "I says, 'Yes.' And he says, 'Besides, I have had complaints from others and,' he says, 'specifically a Lt. Murphy; that we would get the best places lined up for ourselves and nobody else can seem to touch them.'"

A few minutes later Fischer met again with Rifkin and Cello, directed them ". . . to get a list each month . . ." and to avoid trouble spots: ". . . bars that patronized broads, which means, you know, catering to broads, prostitutes; no after hours; no minors" (Tr. 4395). Several days later, in the presence of Rifkin, Cello and Mascolino, Fischer received a list of taverns from Napier and was told by Rifkin that there were no trouble spots on the list; when Rifkin suggested that Braasch and Fischer should be "'. . . part of this'", Fischer declined but said he would speak to Braasch (Tr. 4396-4399). A few minutes later Fischer handed the list to Braasch in his office; Braasch deleted 2 trouble spots from the list and, when told that Mascolino would add several names to the list, Braasch told Fischer to get a list every month, which they would review for trouble spots (Tr. 4400-4401). Fischer then relayed Rifkin's suggestion that Braasch and Fischer be *part of this* and stated to Braasch his own opposition (Tr. 4402; emphasis added):

> ". . . if there is any complaints on these places and there has to be an arrest made, why, if we weren't taking money from it, why we could tell them to go out and make the arrest. But if we were taking money from the thing, we would be in kind of an awkward situation. They could very well say, 'Well, you are getting money from this place, too.' So, I suggested that we don't participate, partake in any money in this and besides, '*We got our own thing going and let's not get hungry.*'"

Braasch agreed (Tr. 4403). A few minutes later Fischer returned the list to Napier, in the presence also of the other 3 collectors, mentioned the 2 deleted trouble spots

and the monthly list for review, and ". . . told Rifkin that we would not be part of the club on a monthly basis" (Tr. 4404-4405). Fischer later received monthly tavern lists in December, January, February and March, which were shown by him to Braasch and then returned to Rifkin or Napier (Tr. 4405-4420). In mid-March, 1967, upon his promotion to lieutenant, Fischer was replaced as vice coordinator by Sergeant (and defendant) Edward J. Barry (Tr. 4429). Fischer could only recall 10 bars from the 5 monthly lists, and never distributed any of this money, either to Braasch or to any vice officer (Tr. 4436-4437). The bars on the monthly lists were commonly described by several police officers as ". . . vice club or little club" (Tr. 4441).

At this point Fischer, having *completed his narrative* of Braasch's involvement in the "little club" (after only 61 pages of transcribed testimony), was shifted into a second conspiracy (Tr. 4441), which he would describe at great length throughout *another full day of direct examination* (ending at Tr. 4681). As its launching pad for this extensive new and unheralded chapter of alleged police corruption, the government used Braasch's review of the December "little club" list (" 'Isn't that one of our places in the Big Ten?' ": Tr. 4411) which followed Fischer's directive to the collectors in late November that there were 10 Rush Street area bars not to be included in the "little club" (Tr. 4405-4408). These 10 bars were commonly described by several police officers as the "Big Ten" or the "Big Club"; this ". . . referred to ten bars on or about the Rush Street area, for which I was receiving money from a man by the name of Bill Gold" (Tr. 4442). After Bill Gold first telephoned him in mid-October, 1966, Fischer told Braasch that Gold said ". . . he had some business

that may be of interest" to Braasch and Fischer and that Rifkin had described Gold as a man who " 'represents the *gambling element* on the north side' " (Tr. 4455-4458; emphasis added). After Braasch told him to meet with Gold and listen to his proposal, Fischer met Gold the next day at Alexander's Restaurant near 79th and Exchange in Chicago, and received 4 $100 bills from Gold after their lunch (Tr. 4459-4463). Fischer returned to Braasch's office and described Gold's proposal (Tr. 4464-4466; emphasis added):

> "I told Braasch I had a conversation with Bill Gold and that he had offered us an arrangement; that the arrangement was *$3600 a month for the protection of gambling* in the 18th District; that there was another *$1500 a month to be offered for the protection of ten night spots* in the 18th District.
>
> "He described the gambling that he was talking about as bookmaking, horses, some policy, he said, and a little bolita. . . .
>
> "I told Braasch that I asked Gold if I could have a list of these places and he says, 'You would never get a list of the bookies or the gambling people. You will never get a list of that.' He says, 'If you agree to that arrangement, you will get a list of the ten night spots.'
>
> "I asked what our obligations were and he says, *'Don't look for the bookies and I would like a phone call before you raided a place;* that is made an arrest.'
>
> "And I told him I didn't think we could do that. And I asked what the obligations were for the ten night spots and he described it as no aggravation, which when I pressed him a little on that, he said,

'I don't want policemen going into these places throwing their flashlights around in people's faces and checking ID cards and so forth.'

"I told Braasch that Gold said that had I reached out for him earlier, that the thing could have gotten set up for October, but now that it was late in October, if we were to get it set up for November, why he would have to know about it in just a few days and Braasch said, 'Well, what about the vice men'?

"And I said, 'Well, the only two vice men I can think of that we would have to worry about would be Rifkin and Cello *because they were assigned to work gambling on days*, and as for the ten night spots, we could just kind of play that by ear and when it became necessary to tell—I was offering this idea—that when it became necessary—somebody made inquiries or somebody came up, then we would have to let the word out on that.

"So Braasch said, 'Well, let's give the whole package a try. Let's see.' . . .

"And then he leaned over and smiled and he says: *'You know, this guy Holzman is an easy act to follow.'*"

At Braasch's suggestion, Fischer then placed 2 $100 bills in Braasch's desk (Tr. 4468). A few days later, in the same restaurant, Fischer told Gold his proposal was entirely acceptable; Fischer then read the names of 10 bars, which Fischer listed on a paper napkin he retained; Gold described the payment procedure, to occur in a room at the Dearborn Hotel during the first 9 days of each month, after a telephone call to Fischer; and Gold said ". . . it would be Braasch's obligation to take care of the captains, the lieutenants and the vice men, out of this package of

money" (Tr. 4469-4472). On the next day, during lunch, Fischer informed Braasch of Gold's statements; Braasch said $500 would be paid to the captains and *nothing* to the lieutenants; Braasch and Fischer decided that $400 would be paid to Rifkin and Cello, and another $100 to Edward Barry; Braasch suggested that he and Fischer share the balance; and Braasch told Fischer to give him 2 envelopes each month, one with $500 for the captains and the other with the Barry-Braasch share, and to make direct payments to Rifkin and Cello (Tr. 4474-4476). The November payment from Gold to Fischer was $5,500, including an extra $100 Gold said was for Fischer's inconvenience and an extra $450 he said was for the lieutenants: "[h]e said that *some of them had been over to the shirt store complaining that they heard things were going and there was nothing for them. I think the term used was 'their end', or something like that*" (Tr. 4487-4489; emphasis added). Gold also then asked Fischer to straighten out 2 sergeants that were bothering 2 "Big Club" members (Tr. 4489). When Fischer returned to Braasch and mentioned the lieutenants' complaints, Braasch told him to take care of the lieutenants and also to keep the extra $100 himself; Braasch aiso said he would speak to the watch commanders about the 2 sergeants (Tr. 4491-4492). The Braasch-Barry share of the November payment (identical tc the Fischer share) was $2,200 or $2,300 (Tr. 4498-4500). The December payment from Gold also was $5,500 and the Braasch-Barry share and Fischer were each about the same as November (Tr. 4502-4503). According to Fischer's record of receipts and disbursements commencing in January, 1967 (Gov. Ex. 103), the January 1967 payment from Gold was $6,600, which Gold explained: "[h]e said, 'there is an extra $960 in the envelope. *Some of the sergeants have been over to*

the Shirt Store complaining that they weren't getting their end' " (Tr. 4508-4529; emphasis added). Braasch later told Fischer to forget about the sergeants, and to divide the $960 between Braasch and Fischer (Tr. 4509). The January Braasch-Barry share was $2,590 (Tr. 4529). In late January, at Alexander's Restaurant, Gold introduced Fischer to "Pat Riley" (actually Dan Glitta), his February replacement, who in turn said he would use a motel for the February payment; in February Fischer did receive $6,600 from Glitta at the Holiday Inn on Lake Shore Drive (Tr. 4531-4536). The February Braasch-Barry share was $2,590 (Tr. 4536). The March payment from Glitta at the Mart Inn was $6,360; the death of Bill Gold was discussed and Glitta said, "'. . . I will be handling *his spot* from now on. So we will just keep on doing things the same way'"; and the March Braasch-Barry share was $2,442.50 (Gov. Ex. 104) (Tr. 4539, 4551-4552; emphasis added). In mid-March, 1967 Braasch and Fischer met in a Lincoln Park parking lot and discussed Fischer's promotion and preference to be assigned to Area 5 Auto Theft; they agreed that Fischer would continue the monthly "Big Club" collections, that Fischer's monthly share would be reduced to $500, that Fischer's successor as vice coordinator (Barry) would receive $1000 each month, and that Fischer was to explain everything to Barry except the amounts involved (Tr. 4555-4558). For the next 22 months, from April, 1967 through January, 1969, Fischer continued to make the collections from Glitta and the distributions (in 5 envelopes per month, one of which contained Braasch's share) to Braasch; according to Fischer's records (Gov. Ex. 105 through 111), the monthly amounts through February, 1968 were as follows (Tr. 4558-4600):

Month	*Total Payment*	*Braasch's Share*
April 1967	$6,810	$3,710
May	6,660	3,560
June	6,360	3,260
July	6,360	3,260
August	6,210	3,110
September	6,210	3,110
October	6,210	3,110
November	6,360	3,835
December	6,360	3,260
January, 1968	6,210	3,110
February	6,210	3,110
	$69,960	$36,435

Fischer's records of receipts and distributions from March, 1968 through January, 1969 were destroyed in the spring of 1971; during each of those 11 months the total payment from Glitta was around $6,500 and Braasch's share was around $3,200 to $3,300 (Tr. 4620-4622). Except for one delivery to Barry, and 3 deliveries to Braasch at a gas station and 2 restaurants, Fischer's delivery of the 5 envelopes during each month from April, 1967 through January, 1969 was made to Braasch at Braasch's home, 9739 South Bell in Chicago (Tr. 4568, 4589-4595, 4599-4600, 4622-4623). In early February, 1969 Glitta informed Fischer that "'[t]hose people want to knock it down . . . five hundred [']and he says they are rather insistent on it. And Glitta asked me how do you think your boss would feel about that . . ."; when Fischer told Braasch about the $500 reduction the next evening at Braasch's home, "Braasch appeared angry and said, 'I think I will just put the whole thing down. . . . I will let you know'" (Tr. 4625-4628). Several days later, on a Saturday in Dan Ryan's Woods, Braasch told Fischer: "'I am going to put the whole thing down. Just don't bother to see your friend

Glitta anymore'" (Tr. 4630). Fischer never again received money from Glitta (Tr. 4631). Fischer did, however, receive a telephone call from Glitta in mid-February, 1969, and within 2 hours met with Braasch in Braasch's home; Braasch explained that Barry (Fischer's replacement as vice coordinator) had been authorized by him to confer with Glitta about "the package" and the $500 reduction; as Braasch put it, "'I can't afford to have it knocked down $500. *I have got additional expenses. . . .* I guess you have never heard of Linsky'" (Tr. 4632-4637; emphasis added). Fischer was, in fact, well aware that Linsky was Deputy Chief of Patrol for Area 6 and Braasch's immediate superior (Tr. 4638). Several weeks later, at either Chances R or the Pickle Barrel on Wells Street, Fischer asked Barry why he reached out on his own to replace Fischer, and Barry explained that he had been instructed by Braasch, that he was not a volunteer (as Braasch had told Fischer) and that everything had been straightened out (Tr. 4639-4641). *Fischer's total collections from Gold and Glitta during 27 months were around $165,000 and Braasch's share was around $85,000* (Tr. 4641-4642). The original members of the "Big Club" were: The Velvet Swing, Pigale, Club 19, Ad Lib, 6 East Chestnut, Whiskey A Go-Go, Bourbon Street, Casanova, Crystal Pistol and The Nite Life (Tr. 4665). Supplemental members during Fischer's 27 months were: Beer Joint, Down the Street, Scotch Mist, Las Vegas, House of Eng, Cat's Eye and Little Las Vegas (Tr. 4666). Fischer described the special features and entertainment offered by various "Big Club" members (Tr. 4667-4672). Fischer (despite his assignment elsewhere) was permitted to testify that, during the 27 months of his collections, he recalled *no arrests* by officers of the 18th Police District on the premises of "Big Club" members (Tr. 4673).

Appeal

Relative to the introduced evidence of the uncharged "Big Club" conspiracy, the court of appeals ruled that the evidence was relevant proof of this petitioner's "motive" and that the degree of this collateral proof was justified (Appendix, *infra*, p. 16a):

> "True it is that detailed evidence as to a similar, contemporaneous conspiracy has a potentially prejudicial effect, but here that effect was outweighed by the importance of this motive evidence as well as the District Court's cautious and thorough limiting instructions. . . ."

The court of appeals also held that this petitioner ". . . had both notice and opportunity to meet the Government's proof of concurrent criminal conduct" (Appendix, *infra*, p. 16a).

Relative to the severance questions, the court of appeals ruled joinder of the conspiracy and perjury (or false declaration) counts was proper and ". . . has now been given full approval by this circuit" (Appendix, *infra*, p. 17a), and ruled further that a single trial of the 15 allegedly perjurious defendants, in which the jury was charged ". . . to render separate verdicts on each defendant", was also proper since ". . . the massive duplication of effort entailed in separate trials is not justified absent a more specific claim of prejudice . . ." (Appendix, *infra*, p. 17a).

REASONS FOR GRANTING THE WRIT

As previously set forth in the Questions Presented, there are 5 submitted reasons for review on writ of certiorari, 3 pertaining to evidence of the uncharged "Big Club" conspiracy (reviewed in the Statement) and 2 pertaining to pre-trial denials of severance.

1. *Unrestricted evidence of the uncharged "Big Club" conspiracy.*

The court of appeals approved the government stratagem of injecting enormous "Big Club" details before the jury (including a variety of such sordid deeds as syndicate contract killings), a *sine qua non* to any conviction of Braasch, on the grounds that its ". . . potentially prejudicial effect . . . was outweighed by the importance of this motive evidence as well as the District Court's cautious and thorough limiting instructions. . . ." (Appendix, *infra*, p. 16a). There can be no dispute about the "importance" of this evidence: the government's case against Braasch was dependent entirely upon the procured and virtually uncorroborated testimony of former police lieutenant Robert W. Fischer, from whose shattered credibility the government desperately needed some maneuver to divert the jury's attention.[1] Rather than serving to favor such admis-

[1] For example, for 16 months commencing in November, 1968, while he was taking around $6,500 each month from the syndicate, Lieutenant Fischer was assigned to Inspectional Services and was responsible for reviewing and inspecting the conduct of police officers; he never shared his secret with anyone at police headquarters (Tr. 4807-4809). On November 9, 1972 (shortly after

(continued on following page)

sion, however, the "importance" of such collateral and crippling proof should serve to underscore the need for sensitive judicial regulation and for strict confinement to necessary details. The Ninth Circuit, for example, correctly holds that the stronger the government's case, the less is the need for exclusion. *United States* v. *Parker*, 469 F.2d 884, 894 (9th Cir., 1972). The court of appeals in the case at bar has spawned an unwise and isolated precedent that moves in the opposite direction, inviting the government to project such elaborate contamination into future trials where its evidence is otherwise weak. Apart from creating a test of "importance", the court of appeals ignored the mandatory restraint of *necessity* illustrated in another Seventh Circuit panel's recent reversal, *United States* v. *Ostrowsky*, 501 F.2d 318, 323 (7th Cir., 8-5-74): "The evidence of the other crime need only be clear and convincing: it need not, indeed should not, involve a trial within a

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government witnesses Cello, Rifkin and Mascolino had purged their contempt of immunity orders and thus secured their release from jail), Fischer was escorted to the United States Attorney's office where, asked to explain any corruption in the 18th Police District, he stated repeatedly that he knew nothing (Tr. 5002-5007, 5020-5021). Even when his tongue had been loosened by an immunity offer, Fischer was still cautious enough not to mention Ostrowsky (Tr. 5017-5018); Ostrowsky, a widely reputed auto thief (Tr. 5138-5139), paid Fischer $200 each week from mid-1970 until December, 1971, with an extra $500 thrown in (Tr. 4813-4815, 5012-5017). Marcus Cohen, a junk yard operator, after Fischer accused him of bribery in March, 1971, also became a periodic benefactor (Tr. 5027-5029). Fischer testified that in March, 1967, he voluntarily reduced his share of the "Big Club" from around $2,500 to only $600 each month; in short Fischer said he gladly walked away from around $59,000 otherwise his between April, 1967 and January, 1969 (Tr. 4995). He also testified that, between October, 1966 and January, 1969, he privately received around $174,420 in syndicate cash from Bill Gold and Dan Glitta, and then took the money home.

trial. . . . But having decided to admit the evidence the court must also limit the evidence to the quantity that is necessary to the purpose for which it is admitted." The petitioner's unhappy posture in the trial at bar was a classic example of a man charged with one offense and placed on trial for another, with no restraint applied by either the trial judge or the government upon the amount of collateral proof introduced.

The second justification by the court of appeals, ". . . the District Court's cautious and thorough limiting instructions . . ." (Appendix, *infra*, p. 16a), was misconceived for 3 reasons. First, no limiting instruction was given until Fischer's direct examination had indelibly contaminated the jury (Tr. 4441-4681). Secondly, the limitation itself (". . . only as it relates to Braasch or Barry's motive and intent in connection with the conspiracy charged in Count I of the indictment and you cannot consider this evidence for any other purpose") was meaningless to a jury which had never seen Count I of the indictment and had not been told *which* of the 2 conspiracies was in fact charged. Thirdly, the opinion's crucial reliance upon ". . . the effectiveness of these carefully drawn instructions" (Appendix, *infra*, p. 16a) is not well founded. *Contra*: *United States* v. *Byrd*, 352 F.2d 570, 574 (2d Cir., 1965); see also *Bruton* v. *United States*, 391 U.S. 123, 135 (1968).

In suggesting a conflict with other courts of appeal and a serious departure from the accepted and usual course of judicial proceedings, this petitioner respectfully invites the Court's attention to a revealing sequence of the "Big Club" presentation. Although Fischer had described to prosecutors the "Big Club" conspiracy at length in an interview 2 months earlier (Tr. 4877), the government filed a formal document on March 22, 1973, after this petitioner's

request, disclaiming any intention to transcend the borders of the indictment except for one tavern (R. 157, p. 4), and the government's opening statement on August 13, 1973 was consistent with that unrevoked disclaimer (Tr. 21, 30). Secretly departing from the trial procedure of submitting advance briefs upon delicate issues of evidence, the government boldly and without warning elicited from its 20th witness (Napier) the *hearsay* that Bill Gold told him ". . . that he was giving the monthly gambling package to Commander Braasch . . . [and] that Commander Braasch was going to keep all of the gambling . . ." (Tr. 2352). Clearly displeased and perplexed, and anxious not to abort the protracted trial despite mistrial requests, the trial judge expressed his loss of control (Tr. 2357; emphasis added):

> "The fact is in the fire as far as this witness is concerned now, so all we can do is follow through *on the expectation that he does tie it up. . . .*"

After and perhaps because of that crucial ruling, on the advent of Fischer to the witness stand the trial judge refused to bar or even to regulate the "Big Club" presentation: "*I will not restrict the Government* on the introduction of the evidence, so that the motions are denied" (Tr. 4356; emphasis added). Repeated objections and mistrial requests throughout Fischer's 4-day testimony were denied (Tr. 4446-4447, 4482-4486, 4526-4528, 4606-4616, 4685-4687, 4919-4921 and 5205-5223), although the trial judge did reveal his uneasiness with the government's refusal to exercise self-restraint (at 4921):

> ". . . The only witness who could testify to the conspiracy, which went in to prove motive and intent of your client [Braasch], must come in through Fischer and not through Rifkin. I have no intention of muddying the waters in that same sense. I knew nothing

> about the elements that Mr. Fischer was going to put in. I knew as little as any man who has ever heard a case as to what the Government's evidence would unfold. . . ."

Any doubt about the government's diversionary "Big Club" purpose, and about the futility of its self-proposed limiting instructions, was erased during its closing argument, which repeatedly reminded the jury of Fischer's self-proclaimed duties as Braasch's "bag man" and used his testimony to smear this petitioner: ". . . the only thing that Clarence Braasch did not have time to do was to go pick up the money. That is what he had Robert Fischer for. Fischer became his bag man. . . ." (Tr. 6963-6972). The case at bar, clearly illustrating governmental misuse of evidentiary rules to confuse the issues, mislead the jury and engineer a conviction, does indeed call for the exercise of this Court's power of supervision.

2. *Prejudicial variance.*

An inextricable issue in the government's "Big Club" presentation is whether, in view of the absolute distinction between the "extortion" conspiracy charged in the indictment, and the uncharged "extortion" conspiracy upon which this petitioner's conviction was premised, the record poses such a confused "trial within a trial" that, as expressed in *Stirone* v. *United States*, 361 U.S. 212, 217 (1960), ". . . there was a variance in the sense of a variation between pleading and proof. . . . [which] here destroyed the defendant's substantial right to be tried only on charges presented in an indictment returned by a grand jury." Although confronted with this issue in this petitioner's original brief (p. 28), reply brief (p. 9) and petition for rehearing (p. 7), the court of appeals never expressly resolved this claim. Since *Stirone* commands ". . . that a

court cannot permit a defendant to be tried on charges that are not made in the indictment against him" (361 U.S. at 217), this Fifth Amendment claim is indeed serious and worthy of this Court's review.

3. *Concealment of government plans to introduce elaborate "Big Club" details.*

The government's pretrial answer to this petitioner's motion for a bill of particulars described the Scotch Mist as the only retail liquor establishment, other than the 53 named in the indictment, about which ". . . the government intends to introduce testimony" (R. 157, p. 4). The government's opening statement at trial, with references to ". . . these 53 taverns" (Tr. 21, 30), was equally reticent about its powerful anti-Braasch strategy. Midway through its case, the government first mentioned in passing that ". . . we intend to have Fischer testify *generally* about the parcelling, because it is the only motive he had" (Tr. 2357; emphasis added). The real thrust of Fischer's extraneous testimony was not revealed, however, until the government had presented 56 of its 61 case-in-chief witnesses, and Fischer was next (Tr. 4346-4363). On appeal the government tried to justify its artfully concealed plans, and to distinguish *United States* v. *Baum*, 482 F.2d 1325, 1329-1332 (2d Cir., 1973), because "Fischer's name was set forth on the face of the indictment" (Gvt. Br., pp. 123-124). Not only did that apologia beg the very important question whether Fischer's "Big Club" narrative was the truth, but it ignored the more fundamental issue whether prosecutorial deception on the grand scale practiced here can be reconciled with fundamental fairness. The opinion of the court of appeals, in no way discouraging such practices in the future, simply concluded that *Baum* is ". . . distinguishable since appellant had both notice and oppor-

tunity to meet the Government's proof of concurrent criminal conduct" (p. 16). This petitioner respectfully disagrees that any genuine notice and opportunity to defend was afforded, and suggests that, because ". . . a person charged with a criminal offense has the right to assume that he will be tried for that offense only . . .", *Mills* v. *United States*, 367 F.2d 366, 367 (10th Cir., 1966), the government has no right to place a man on trial while suffering from the invited misconception that he is defending himself only against the charges in the indictment.

Opinions related to this specific issue are divided. The Supreme Court of Minnesota long ago adopted a rule that such other-crime evidence (with a few exceptions) ". . . shall not hereafter be received unless within a reasonable time before trial the state furnishes defendant in writing a statement of the offenses it intends to show he has committed, described with the particularity required of an indictment or information. . . ." *State* v. *Spreigl*, 139 N.W. 2d 167, 173 (Minn., 1965). The Eighth Circuit went the other direction in *McConkey* v. *United States*, 444 F.2d 788, 789-790 (8th Cir., 1971), cert. denied 404 U.S. 885, declining in *dictum* to follow *Spreigl* because it felt the proposed rule was a question to be decided elsewhere ". . . for purposes of uniformity in the federal system . . . rather than to be dealt with as a question of local policy or standard on the part of the Circuits individually" (at 790). As demonstrated in the case at bar, a frequently recurring incident, the need for a uniform pre-trial notice requirement is immediate and compelling, and deserves this Court's present attention and review.

4. *Joinder of conspiracy and false declaration counts.*

The divided opinion within the Seventh Circuit, upon this question, is demonstrated by the original and unani-

mous panel reversal in *United States* v. *Pacente,* 490 F.2d 661, 662-666 (7th Cir., 12-28-73), and the ultimate 4-2 affirmance, after rehearing *en banc,* in *United States* v. *Pacente,* 503 F.2d 543, 544-553 (7th Cir., 8-6-74). Particularly in view of the circumstances in the case at bar, including this petitioner's recall for testimony contrary to the charges in the 40-page indictment returned 9 days thereafter, a move inspired by the government's plan to shore up its weak conspiracy case against him with a false declaration count, this petitioner was severely prejudiced by the joinder and submission to a single petit jury of the conspiracy and false declaration counts.

5. *Joinder of defendants.*

The opinion of the court of appeals, suggesting that joinder of substantive and perjury counts ". . . has now been given full approval by this circuit" (Appendix, *infra,* p. 17a), failed to note the distinct circumstances here. The indicting grand jury had heard testimony from 2 groups of this petitioner's alleged co-conspirators (exclusive of any tavern witnesses): those who supplied the heart of the government's case-in-chief (Fischer, Cello, Mascolino and Rifkin) and those who were branded by the grand jury as perjurers and then placed in the dock with this petitioner (the 14 defendants charged in Counts II through XIV and XVI). The grand jury, far from simply announcing that the 4 chief governmental accomplice witnesses had provided sufficient evidence to dictate a trial, also announced that 14 of 22 of this petitioner's codefendants at trial (1) had contradicted one or more of the 4 chief governmental accomplice witnesses by self-exculpatory grand jury testimony and (2) had not been believed by the 23 indicting grand jurors. Not only did this petitioner suffer the personal stigma of probable guilt nat-

ural to being posted along the side of those 14 disbelieved "accomplices", which itself shattered the presumption of his innocence from the inception of trial, he also suffered a death blow to his opportunity to defend since there was a common defense that the testimony of the 4 chief governmental witnesses was not worthy of belief. The reliance by the court of appeals upon cautionary instructions (Appendix, *infra*, p. 17a) overlooked the fact that no such instruction was given until the final charge (Tr. 7555), some 16 days after the jury heard the collectively repudiated grand jury testimony (Tr. 5500-5581). The prosecutorial weapon of multiple perjury counts used to bolster accomplice testimony in a multi-defendant prosecution provides the government with a crippling advantage inconsistent with a fair trial.

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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December 20, 1974

APPENDIX A

In the
United States Court of Appeals
For the Seventh Circuit

No. 74-1000 thru 74-1017 and 74-1105

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

CLARENCE E. BRAASCH, EDWARD J. BARRY, JOHN M. GERAGHTY, DANIEL H. ARMSTRONG, THOMAS D. BATASTINI, NATALE R. CALE, JOHN CATALANO, MARTIN D. ESHOO, EDWARD F. FINN, CARL FLAGG, PHILIP R. GRANA, EDWARD McGEE, EMMONS P. RUSSELL, HARRY R. SALVESEN, JOSEPH A. SCHILLINGER, STEVE L. SENO, WILLIAM D. SWALLOW, THOMAS D. WEST and MIKE ZAKOIAN,

Defendants-Appellants

ARGUED JUNE 5, 1974 — DECIDED OCTOBER 23, 1974

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division — No. 72 CR 979
William J. Bauer, *Judge*

Before CLARK, *Associate Justice,** FAIRCHILD and STEVENS, *Circuit Judges.*

CLARK, *Associate Justice.* This prosecution, brought under the extortion statute, 18 U.S.C. § 1951[1], depicts a betrayal of public trust of the most alarming type to a

*Honorable Tom C. Clark, Associate Justice (Retired) of the Supreme Court of the United States, is sitting by designation.

[1] 18 U.S.C. § 1951:

(a) Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by *** extortion or attempts or conspires so to do, *** shall be fined not more than $10,000 or imprisoned not more than twenty years, or both.

(b) As used in this section — ***

free society: the corruption of the entire vice squad of the 18th Police District of Chicago over a period of many years.

The indictment covers the period from 1966 to 1970 during the tenure of Captain Clarence E. Braasch as Commander of the 18th Police District and names as co-conspirators more than two dozen police officers who were attached to the 18th District during all or part of that period, including Braasch and three vice coordinators, Sergeants Fischer, Barry and Geraghty. The facts are "stranger than fiction",[2] revealing a brazen extortion scheme involving a shakedown of some 53 bars, taverns and other business establishments serving alcoholic beverages and located within the District. Initially, four police officers on the vice squad — two during daylight hours and two at night — collected $100 to $150 per month from each of such establishments and divided this money, known as the "package", among the members of the vice squad. The *quid pro quo* on the part of the police officers was that they would "protect" the victims of the scheme — known as the "vice club" or "little club" — from enforcement of various regulatory laws and from loss of business, revocation of licenses and other disturbances, some of which were caused by manufactured police harassment.

In the regular operation of the "little club", a vice coordinator would obtain from the police officers of the vice squad a monthly list of the establishments that might be included in the club's collections and present this list to Captain Braasch who would then strike from it the names of those establishments that he decided should be excluded for various reasons. The resulting list contained the names of the club "members" until the next month's list was approved.

[1] *Continued*

(2) The term "extortion" means the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right.

(3) The term "commerce" means *** all commerce between any point in a State, Territory, Possession, or the District of Columbia and any point outside thereof ***.

[2] Byron, *Don Juan*, Canto XIV, St. 101.

From the testimony, it appears that a similar "club" existed in the district at least as far back as 1961, but abruptly ceased operations in the middle of 1966 when Captain James Holzman was appointed District Commander. The rapid change of command from Holzman to Captain Braasch in August 1966 marked the beginning of the conspiracy at bar.

Braasch brought with him Sergeant Robert Fischer to be his new Vice Coordinator. Soon after Braasch and Fischer began their new assignments, one Bill Gold, representing certain nightclub and gambling interests in the 18th Police District, telephoned Fischer that he wanted to see him about some business that might be of interest to him and his boss, Captain Braasch, and left his telephone number. Fischer reported the call to Braasch, who told him to see Gold. At lunch the next day, Gold told Fischer that he would pay Captain Braasch $3,600 per month to protect gambling operations in the 18th District from police harassments and arrests, and, in addition, he would pay $1,500 per month for Braasch to protect ten specific night spots also in the 18th District.

Fischer reported to Braasch, who promptly accepted the offer. This arrangement, known as the "big ten" or the "big club", started in operation in October, 1966, and continued at least during Braasch's tenure as Commander of the 18th District which ended in 1970. For some 27 months during the operation, Fischer acted as "bagman" for Braasch. The money was collected first from Gold and, after his death, from one Glitta, and ran as high as $6,810 a month. Initially, some of the money was passed on to key police officers, such as Braasch's friend, Barry, a group of Captains and Lieutenants, and two vice squad officers, Cello and Rifkin. The latter two were included because, as Fischer testified, "the only two vice men . . . we would have to worry about would be Rifkin and Cello because they were assigned to work gambling on day . . . ."[3] Fischer was succeeded by Barry

[3] After these payments Braasch and Fischer split the balance equally between themselves, except $100 which was given by Gold and Glitta to Fischer as a "tip". During the

as "bagman" for the "big club", but the record does not show the take during that period.

In November of 1966, some of the members of the Vice Squad approached Fischer with regard to their resumption of the pre-Holzman practice of collecting monies from retail liquor establishments in the District. The word about the "big club" had gone the rounds of the Vice Squad and its members were anxious to share in the proceeds. When Fischer made it clear that Braasch would not be sharing the payoffs from the "big club"; it was suggested that the Vice Squad police officers organize their own "club" among the remaining bars and taverns in the District. Fischer then took this matter up with Braasch who agreed to the proposal. According to Fischer's testimony, when Braasch was apprised of the proposed "club", he commented: "I guess it is not a bad idea if these guys want to make a buck for themselves. We got our own thing going, haven't we?" Braasch's primary concern was that he have a veto power over which establishments would be included.

Braasch was interested not only in making sure that none of the nightclubs in his own "big ten" were being shaken down by the Vice Squad, but also in keeping off the list any "trouble spots" — establishments that catered to prostitutes, operated after hours, or served minors — which might prove embarrassing if the public insisted on police action. Pragmatically, Braasch and Fischer decided not to share in the proceeds of the "little club" for reasons related by Fischer in his testimony. According to Fischer, he told Braasch, when they were privately discussing the "little club" arrangement:

> [I]f there is any complaints on these places and there has to be an arrest made, why, if we weren't taking money from it, why we could tell them to go out and make the arrest. But if we were taking

[3] *Continued*

period that Fischer acted as "bagman", the total payoffs amounted to some $185,000. Braasch received in total about $85,000, and Fischer about $25,000. Barry first received $100 a month as a favor from Braasch, but later $1000 a month when he became Vice-Coordinator; the Captains as a group received $500 a month; the Lieutenants $600 a month; and Cello and Rifkin $200 each per month.

> money from the thing, we would be in kind of an awkward situation. *** So, I suggested that we don't participate, partake in any money in this and besides, "We got our own thing going and let's not get hungry."

Braasch agreed.

The original collectors for the "little club" were Cello, Rifkin, Mascolino and Napier, all of whom were Vice Squad officers, and who subsequently testified as witnesses for the Government. Toward the end of 1966 or early 1967, the members of the 18th District Vice Squad held a meeting in the 18th District station house to discuss the functioning of the extortion "club". At that meeting, the officers discussed the procedures to be followed in protecting their "club" members; they discussed the amount of money that would be paid to each vice officer as more bars were recruited; and they discussed which officers would be responsible for collecting the money on each shift.

While Fischer and Barry were Vice Coordinators, Officers Cello, Rifkin, Mascolino, and Napier distributed the money they collected from the bars among the members of the Vice Squad. Cello, Mascolino, Rifkin, and Napier each received approximately $300 and later $500 per month; the other vice men received $150 and later $250 per month as their share of the "package".

Witness Cello testified in the Government's case-in-chief that the conditions for membership were as follows:

> The conditions were that they would pay $100 a month to the vice officer that would be collecting. In return, there would be no harassment by members of the vice squad. Under harassment, it would be classified as premise checks, I.D. checks of individuals in the bars. If it was a gay bar, you would not go in there with flashlights and harass the patrons of the bar. You would assist them in any trouble that they have. If you were assigned to make a followup report, in your followup report you would try to make it or slant it in any way or form that would help the tavern owners.

> If you received knowledge that there was — any knowledge or any information that VCD was going to come into the district to make a raid on these taverns, you would forewarn them. Also that none of the vice — there would be no individual shakedowns by any individual vice officer on these taverns if a check had to be made on a tavern, it would be checked out first with one of us.

As the years from 1966 to 1970 went on, other Vice Squad officers assisted in the collection tasks for the "little club". In February, 1967, Fischer was promoted and transferred to other duties outside the 18th District, and Barry succeeded him as Vice-Coordinator. Barry took over the duties of intermediary between the "little club" and Braasch, but he received no money from the "little club" operation, his take being the $1,000 heretofore mentioned from the "big club". As indicated above, however, Fischer continued as "bagman" for the "big club" through January, 1969. In 1970, Sergeant Geraghty succeeded Barry as Vice-Coordinator and continued to perform the same services as the latter, except that Geraghty assumed the monthly responsibility of personally receiving the "package" collected from the "little club" and distributing it among the members of the Vice Squad.

A. *The Indictment and Trial:*

On December 29, 1972, a sixteen-count indictment was returned against twenty-four Chicago police officers, charging in the first count that they participated in a conspiracy to commit extortion in violation of 18 U.S.C. §1951 by extracting money under color of official right from the proprietors of the fifty-three liquor establishments comprising the "little club". The remaining fifteen counts of the indictment charged separate violations of 18 U.S.C. §1623.[4] Each count separately

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[4] 18 U.S.C. § 1623 in relevant part provides:

(a) Whoever under oath in any proceeding before or ancillary to any court or grand jury of the United States knowingly makes any false material declaration or makes or uses any other information, including any book, paper, document, record, recording, or other material, knowing the same to contain any false material declaration, shall be

charged one of those named in Count One with making false material declarations to the Grand Jury by appearing before the Grand Jury and falsely denying his participation in the "little club" extortion scheme.[5]

At the trial before Judge William J. Bauer which began on August 13, 1973, the Government presented the testimony of seven police officers who had formerly been assigned to the 18th Police District. Five of them — Fischer, Cello, Rifkin, Mascolino and DuShane — testified under immunity granted pursuant to 18 U.S.C.

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[4] *Continued*

fined not more than $10,000 or imprisoned not more than five years, or both.

(c) An indictment or information for violation of this section alleging that, in any proceedings before or ancillary to any court or grand jury of the United States, the defendant under oath has knowingly made two or more declarations, which are inconsistent to the degree that one of them is necessarily false, need not specify which declaration is false if —

(1) each declaration was material to the point in question, and

(2) each declaration was made within the period of the statute of limitations for the offense charged under this section.

In any prosecution under this section, the falsity of a declaration set forth in the indictment or information shall be established sufficient for conviction by proof that the defendant while under oath made irreconcilably contradictory declarations material to the point in question in any proceeding before or ancillary to any court or grand jury. It shall be a defense to an indictment or information made pursuant to the first sentence of this subsection that the defendant at the time he made each declaration believed the declaration was true.

[5] Of the twenty-three defendants who went on trial, eight were charged only in Count One (conspiracy): Police Sergeant Barry, Police Officers Cale, Catalano, Finn, McGee, Salveson, Seno, and Zakoian. The remaining fifteen were charged in Count One and in one of the fifteen individual counts of false declarations to the Grand Jury: Police Captain Braasch, Police Sergeant Geraghty, Police Officers Armstrong, Batastini, Demke, Eshoo, Flagg, Grana, Lazar, Pierson, Russell, Schillinger, Swallow, Troche, and West.

§ 6002; the sixth, Anthony Corsentino, testified without immunity; and the seventh, Lowell Napier, one of those originally indicted, pled guilty before trial and testified. These officers testified to their own complicity in the "little club" and to the involvement of those on trial. In addition, 48 witnesses were produced by the Government who were owners or employees of the liquor establishments in the "little club"; who testified under a blanket immunity grant, and who asserted that they had personally made payments to the police officers who were collecting extortion money for the Vice Squad. The trial was concluded on October 3rd, and the jury found nineteen defendants involved in the instant appeal guilty, and found four others — Demke, Lazar, Pierson and Troche — not guilty on all charges.

We have read the 6,836-page record and find that it reveals a carefully organized and skillfully operated extortion machine of massive proportions in both membership as well as monetary "take"; which operated over several years and corrupted the entire Vice Squad of the 18th Police District, including its top officials. The testimony of the 48 proprietors and employees of the participating "little club" members established that the extortion payments were made. The testimony of the bagmen Cello, Rifkin, Mascolino and Napier confirmed that they had received the payments and disbursed them to police officers of the Vice Squad as well as to themselves. The testimony of DuShane, who was the police officer assigned to clerical work in the Vice Squad, detailed fiscal arrangements. And the testimony of Fischer explained the organization of the "little club": why certain officers, such as Cello and Rifkin, were included in the payoff of both the "little" and "big" clubs; and the intimate conversations that he had with Braasch that tied the latter inextricably to the "little club" conspiracy and revealed the depths of venality to which Braasch would stoop to protect his "own thing" — the "big club".[6]

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[6] Exclusive of the "big club" evidence pertaining to the motivation of Captain Braasch and his various vice coordinators, a number of factors connect each of the remaining

B. *The Issues Tendered Here:*

The appellants raise the following issues, some sixteen in number:

(1) Were the statutory requirements of 18 U.S.C. §6001 *et seq.* met in granting immunity to various Government witnesses;

(2) Was it proper for the trial court to have suppressed the orders granting such immunity;

(3) Was the grand jury process abused by calling certain prospective Government witnesses before the grand jury after the indictment was returned;

(4) Did the re-assignment of the case to another judge several weeks before trial but after completion of pre-trial motions violate appellants' constitutional protections;

(5) Did the conspiracy "affect commerce" within the meaning of 18 U.S.C. §1951;

(6) Was knowledge and intent sufficiently proven;

(7) Was the evidence sufficient to prove Braasch's participation in the conspiracy;

(8) Was the evidence sufficient to prove that Grana's declarations before the Grand Jury were false;

(9) Was the admission of the evidence as to the "big club" improper as to Braasch and Barry and so highly prejudicial to the other appellants as to have denied them a fair trial;

(10) Were the twenty-four defendants and sixteen counts properly joined in the indictment;

* *Continued*

appellants to the conspiracy. First, most of them received a monthly share of the "package" after joining the District Vice Squad; second, many participated in the actual collecting of money from the victim bars; third, some participated in the distribution of the "package"; fourth, some names appeared on a list indicating that they received a share for one month in early 1967; and, fifth, some officers attended the Vice Squad meeting in late 1966 or early 1967 at which the "club" and the "package" were discussed at length. The evidence at trial from the representatives of the bars and taverns as well as that from Fischer, Rifkin, Cello, and the other officers who testified for the Government tied each of the appellants to one or more of these factors.

(11) Does a police officer's abuse of the power of his official position in order to obtain payments from merchants come within the meaning of 18 U.S.C. §1951's ban on extortion "under color of official right.

(12) Was it proper to admit evidence of a similar extortion scheme within the 18th District antedating the conspiracy at bar;

(13) Was it proper to admit evidence showing the state of mind of the extortion victims;

(14) Did other evidentiary rulings result in prejudice to the appellants;

(15) Did the prosecutor's closing argument constitute reversible error because of his references to the evidence tying appellant Grana to the conspiracy; and

(16) Was there an abuse of discretion in the sentences imposed.

The bulk of these issues are either frivolous or controlled by previous decisions and do not merit extended discussion. We will deal with them in the order above outlined.

C. *Disposition of the Issues:*

I.

Appellants claim that the Government failed to comply with 18 U.S.C. § 6002 which, they argue, requires that a witness actually refuse to testify before being granted immunity. Unfortunately for the success of their claim, 18 U.S.C. § 6003 (b)(2) specifically authorizes the Government to seek such a grant where the witness "has refused *or is likely to refuse* to testify or provide other information on the basis of his privilege against self-incrimination." (Emphasis supplied) Appellants also claim that the trial court's immunity orders were too broad, prohibiting the use of the immunized testimony against bar owner-witnesses not only in criminal trials but also in subsequent state administrative proceedings, such as liquor license revocation hearings. However, we need not pass on this difficult question since appellants have no standing to raise the question. *United States v. Lewis*, 456 F. 2d 404, 410

(3d Cir. 1972); *United States ex rel. Berberian v. Cliff*, 300 F. Supp. 8, 14 (E. D. Pa. 1969). *Cf. Lopez v. Burke*, 413 F. 2d 992, 994 (7th Cir. 1969).

II.

Appellants further claim that suppression of the orders granting immunity to several dozen bar owners violated their Sixth Amendment right to the effective assistance of counsel by being denied important information. The suppression orders were entered by Chief Judge Edwin A. Robson in March of 1973, "[i]n order to encourage further disclosures and in order to protect the personal safety and security of the informers and potential witnesses by concealing their identity." Since, as we have said, a defendant has no standing to contest the propriety of a grant of immunity, it follows that appellants had no right to be present at the immunity hearings nor any right to obtain the identity of Government witnesses by or through being furnished copies of the orders granting immunity. Chief Judge Robson denied appellants' motions to lift the suppression order and we agree with his conclusion on the matter. It also follows that defense counsel had no right to be at the immunity hearings. *Cf. United States v. Bennett*, 409 F. 2d 888, 899 (2d Cir.), cert den. sub. nom *Haywood v. United States*, 396 U.S. 852 (1969), holding that defense counsel's presence is not required when a prosecutor interrogates a prospective witness in preparation for trial. Moreover, no possible prejudice could have arisen since a copy of the immunity orders was provided the defense with the Section 3500 material at the conclusion of the direct examination of the first immunized witness and was used by appellants' counsel in cross-examination.

III.

Appellants next complain that the Government abused the grand jury process by calling prospective witnesses before the Grand Jury for the purpose of preparing an already pending indictment for trial. The short answer is that the Government has every right to interrogate witnesses on subjects relevant to a continuing grand jury investigation even when the evidence received may

also relate to a pending indictment. *Beverly v. United States*, 468 F. 2d 732, 742 (5th Cir. 1972). Appellants have shown no prejudice from these occurrences and their contention must fail. *United States v. Star*, 470 F. 2d 1214, 1217 (9th Cir. 1972).

IV.

Appellants next claim that their constitutional protections were violated because of the transfer of the case to another judge. This is frivolous. A litigant does not have a right to have his case heard by a particular judge. *United States v. Dichiarinte*, 385 F. 2d 333, 337 (7th Cir. 1967), cert. den., 390 U.S. 945 (1968); *United States v. Stone*, 411 F. 2d 597, 598-9 (5th Cir. 1969). The fact that the original judge decided pretrial motions is of no consequence. In central calendar courts that is done every day. *United States v. Marachowsky*, 213 F. 2d 235, 244 (7th Cir. 1954), clearly approves the action of one judge sitting for another to make any order necessary to preserve the rights of the parties.

V.

Appellants also challenge the technical sufficiency of the Government's proof that their conduct "affects commerce" within the meaning of 18 U.S.C. § 1951. At the outset we note that there were no objections to the trial court's instructions as to what constitutes effect on commerce. Section 1951 proscribes extortion which "in any way or degree obstructs, delays or affects commerce or the movement of any article or commodity in commerce . . ." As this Circuit held in *United States v. De Met*, 486 F. 2d 816 (7th Cir. 1973), cert. denied, 94 S.Ct. 1991 (1974):

> Because Congress has seen fit to exercise its full power under the commerce clause, extortionate conduct having an arguably *de minimus* effect on commerce may nevertheless be punished. [486 F. 2d at 821]

The record indicates that representatives of eleven Chicago area wholesale distributors of beer and liquor testified as to their purchases of alcoholic beverages

from numerous locations outside the state and six other wholesale distributors were included by stipulation. Voluminous sales and purchase records of the establishments in the "little club" were admitted into evidence. The dependence of the Chicago retail liquor establishments upon interstate commerce for a supply of alcoholic beverages was fully covered by the testimony of the Chief of Technical Services Branch of the Office of the Regional Director of the Mid West Region of the Alcohol, Tobacco and Firearms Bureau. It revealed a limited number of distilleries and wine manufacturers located in the State of Illinois during the period covered by the conspiracy. This proof shows that the impact on interstate commerce was substantial rather than *de minimis*. Nor is there merit to the further contention that the warehousing of the alcoholic beverages prior to sale severs the interstate nexus. *See United States v. Gill*, 490 F. 2d 233, 236 (7th Cir. 1973).

VI.

Appellants also claim that they did not know of either the extortionate nature of the conspiracy, the source of the money they received, or the interstate impact of their involvement. It may well be that each of the appellants did not know of the minute details of the operation of the "little club", but once the conspiracy was established — the evidence of which was overwhelming — slight evidence is sufficient to connect a particular participant. *See United States v. Robinson*, 470 F. 2d 121, 123 (7th Cir. 1972); *United States v. Marrapese*, 486 F. 2d 918, 921 (2d Cir. 1973); *United States v. Nunce*, 483 F. 2d 453, 460 (9th Cir. 1973). Each of the appellants were Chicago police officers assigned to the vice squad, except Braasch who was their boss; each received money every month from the "little club" operation, except Braasch, Fischer and Barry; they knew the money was not due them or their office by reason of their official position; the record directly connects most of the officers with the fact that the money came from the liquor establishments since four of them were collectors of it and others were present when money was collected: Armstrong, Batastini, Catalano,

Eshoo, Finn, Flagg, Grana, Russell, Salvesen and Seno; the operation of the club was freely discussed among the vice officers; Barry was told all about it when he first became Vice-Coordinator; a meeting of the Vice Squad members was held in the 18th District Police Station for the purpose of discussing the "little club"; and Officer DuShane testified that he had conversations about the "little club" with every vice officer assigned to the District during the time in question. Moreover, during the entire relevant period — 3½ years — only three arrests were made by the Vice Squad officers at the 53 bars that were in on the "little club", and after March, 1967, not a single arrest was made by any member of the Vice Squad. In our view the evidence was overwhelming.

VII.

In arguing the insufficiency of the evidence to support his conviction, Braasch specifically attacks the credibility of Fischer. That, of course, was a matter the jury decided against Braasch, and we have no power to set aside their determination on the point. Besides, Fischer was corroborated in large part by Cello, Rifkin, and Napier.

VIII.

Grana claims that the Government failed to prove beyond a reasonable doubt that he made false declarations to the Grand Jury as alleged in Count Seven, relying on *Bronston v. United States*, 409 U.S. 352 (1972). But that case is not apposite, since it involved an ambiguous question and a true but unresponsive answer. The questions put to Grana were not ambiguous nor were his answers unresponsive. Indeed, the latter were unequivocal negative responses to questions probing his knowledge of and participation in the extortion scheme.

IX.

As we have indicated in our factual resume, the Government introduced evidence concerning a "big club" payoff that was not alleged in the indictment. It was introduced solely for the purpose of establishing in-

tent and motive as to Braasch and Barry's participation in the "little club" conspiracy and the trial court so advised the jury with carefully worded instructions. Braasch and Barry, who received none of the proceeds from the "little club", assert that the jury was so inflamed by this evidence that it convicted them for that crime rather than the one charged in the indictment. The remaining appellants also claim prejudice and assert that the jury was confused by the introduction of this separate and uncharged conspiracy into the case. In response, the Government asserts that Fischer's role as Braasch's "bagman" for the "big club" payoffs — a role later undertaken by Barry — was absolutely necessary to paint the whole picture of the "little club" operation and to explain the motive of Braasch, Fischer, and Barry in approving its organization. Since Braasch and his Vice Coordinators had their "own thing going", it was necessary to protect that operation, i.e., the "big club". By examining the monthly lists of establishments in the "little club" which were submitted for his approval, Braasch was able to make certain that there would be no conflict between the two operations. Moreover, the record shows that word of the "big club" had gone the rounds of the Vice Squad and there was dissatisfaction because the Vice Squad was not in on the take. It is a reasonable inference that Braasch concluded that unless he took steps to satisfy the Vice Squad, this dissatisfaction would increase as time passed and disclosure of the "big club" would inevitably result.

It is well-established that proof of motive is one of the exceptions to the general rule that evidence of "other crimes" not charged in the indictment is inadmissible in the prosecution's case-in-chief. *See United States ex rel. Durso v. Pate*, 426 F. 2d 1083, 1086 (7th Cir. 1970), cert. denied, 400 U.S. 995 (1971). As in most questions regarding the admissibility of evidence, trial judges are given wide discretion to balance the proffered item's probative value against its prejudicial effect. *See United States v. Gaus*, 471 F. 2d 495, 499 (7th Cir.) cert. denied, 412 U.S. 938 (1973). We can see no abuse of discretion here.

True it is that detailed evidence as to a similar, contemporaneous conspiracy has a potentially prejudicial effect, but here that effect was outweighed by the importance of this motive evidence as well as the District Court's cautious and thorough limiting instructions which were delivered to the jury not only at the conclusion of witness Fischer's direct examination but again after witnesses Cello and Murphy testified briefly as to their involvement in the "big club", and for a third time in the final charge to the jury. These instructions specified that the "big club" evidence was not to be used against any other of the defendants besides Braasch and Barry, and as to them it was only to be considered as it relates to their motive and intent to participate in the "little club" conspiracy charged in the indictment. We have no reason to doubt the effectiveness of these carefully drawn instructions. *See United States v. Pauldino*, 443 F. 2d 1108, 1114 (10th Cir.), cert. denied, 404 U.S. 882 (1971). The jury verdict — in which four of the twenty three defendants were acquitted — itself supports this conclusion.

Appellant Braasch additionally claims that his constitutional right to be informed of the nature and cause of the accusation against him, guaranteed by the Sixth Amendment, was infringed by the omission of any mention of the "big club" in the indictment. The right to be informed of the accusation is a central right in our constitutional system, but it does not place a limitation on the evidentiary rule which allows the introduction of "other crimes" evidence in the proper circumstances. *Cf. McConkey v. United States*, 444 F. 2d 788, 789 (8th Cir.), cert. denied, 404 U.S. 885 (1971). Here the Government notified counsel for Braasch on August 27th, some two weeks before Fischer testified — and weeks before it closed its case — that it would introduce just such evidence pertaining to his involvement in uncharged criminal conduct in order to prove his motive for participating in the "little club". *United States v. Baum*, 482 F. 2d 1325 (2d Cir. 1973), on which appellant Braasch relies, is therefore distinguishable since appellant had both notice and opportunity to meet the Government's proof of concurrent criminal conduct.

X.

Appellants argue that it was prejudicial under Fed. R. Crim. P. 14 to join the conspiracy count which names all of the 24 conspirators, with the 15 separate perjury counts, each of which named a single conspirator. They rely on the panel opinion in *United States v. Pacente*, 490 F. 2d 661 (7th Cir. 1973), which reversed the convictions of a Chicago police officer on a similar indictment charging both extortion and perjury. Since the time that briefs were submitted in the present case, however, an *en banc* reconsideration of the *Pacente* opinion has resulted in its reversal, *United States v. Pacente*, No. 72-1988 (7th Cir., filed August 6, 1974), so that such a joinder has now been given full approval by this circuit. Morever in the instant case, the trial judge in his charge specifically instructed the jury to give separate consideration to each count and to render separate verdicts on each defendant. The charge admonished the jury further that each defendant was entitled to have his guilt or innocence determined from his own conduct and from the evidence as applied to him as if he were being tried alone and that the guilt or innocence of any one defendant should not influence the jury's verdict respecting the others. Further, with regard to the perjury counts, the charge instructed that testimony introduced as to them was to be considered only as evidence of the false material declaration charge and that the jury should not consider that testimony as evidence of any defendant's guilt as to Count One of the indictment. The fact that the jury found four of the defendants not guilty on both the conspiracy and the respective perjury counts showed that they not only knew what they were doing but did what they intended. *See United States v. Gill*, 490 F. 2d 233, 239 (7th Cir. 1973). We add that the massive duplication of effort entailed in separate trials is not justified absent a more specific claim of prejudice than the one now urged by appellants. *Cf. United States v. Haim*, 218 F. Supp. 922, 932 (S.D. N.Y. 1963); *United States v. Verra*, 203 F. Supp. 87, 90 (S.D. N.Y. 1962).

Some of the appellants contend that the joinder of so many defendants in a single indictment deprived them

of the privilege of calling a co-conspirator to the stand to testify in their behalf. None of the appellants, save Braasch, attempted to make any positive showing of either the utility or the availability of such testimony. As this circuit has held again and again "[t]he unsupported possibility that such testimony might be forthcoming does not make the denial of a motion for severance erroneous". *United States v. Kahn*, 381 F. 2d 824, 841 (7th Cir.), cert. den., 389 U.S. 1015 (1967). Braasch claims that his co-defendant Barry could have testified that Fischer (the Government's star witness against Braasch) told Barry that he (Fischer) had denied to the Government any involvement in any extortion scheme, stating to Barry further: "They [the prosecutors] want Braasch and the only way I could give them Braasch is to lie". However, when the trial judge held an in-chambers *voir dire* on the matter, Barry invoked the Fifth Amendment and refused to answer all questions, including whether he would testify on behalf of Braasch in a separate trial if severance was granted. The facts here are, therefore, a far cry from the leading case of *United States v. Echeles*, 352 F. 2d 892 (7th Cir. 1965), where a co-defendant repeatedly offered to give obviously exculpatory testimony. Barry's refusal to give such assurance left Braasch without that one element which was essential to his motion for severance. *See United States v. Johnson*, 426 F. 2d 1112, 1116 (7th Cir. 1970); *United States v. Caci*, 401 F. 2d 664, 672 (2d Cir. 1968).

XI.

The appellants assert that the crime, if any, charged and proven here is not cognizable under the provisions of the Hobbs Act utilized in the indictment, i.e., extortion "under color of official right". Extortion "under color of official right" as used in the Act, they say, means either the acceptance of money by a public official to perform an act that he was already under a legal duty to perform or, alternatively, the taking of money under a claim by the officer that he had an official right to the money by virtue of his office. Here, they urge, the proof showed only that the appellants took

money to refrain from performing their duties and thus their conduct could not be included in the statutory phrase "under color of official right", but instead "constitutes classic bribery", citing *People v. Dioguardi*, 8 N.Y. 2d 260, 203 N.Y.S. 2d 870 (1960), and other New York cases. Pursuing this line of argument, appellants contend that there was a fatal variance between indictment and proof since the conduct proved did not fall within the "official right" extortion charged and the Government failed to charge them with the other type of extortion covered by the first clause of 18 U.S.C. § 1951 (b)(2) — extortion by the wrongful use of actual or threatened force, violence or fear.

Appellants, however, overlook the fact that the evidence shows that the conspirators used the power and authority vested in them by reason of their office to obtain money not due them or due the office. The use of office to obtain payments is the crux of the statutory requirement of "under color of official right", and appellants' wrongful use of official power was obviously the basis of this extortion. *See United States v. Staszcuk*, No. 73-1869 (7th Cir., filed Sept. 10, 1974). It matters not whether the public official induces payments to perform his duties or not to perform his duties, or even, as here, to perform or not to perform acts unrelated to his duties which can only be undertaken because of his official position. So long as the motivation for the payment focuses on the recipient's office, the conduct falls within the ambit of 18 U.S.C. § 1951. That such conduct may also constitute "classic bribery" is not a relevant consideration.[7]

The police officers of the vice squad harassed bars, taverns and liquor establishments through their official position by making unusually frequent premise checks (four times a day) and identification examinations of patrons; they inspected bars catering to homosexuals

[7] As appellants themselves point out, "the modern trend of the federal courts is to hold that bribery and extortion as used in the Hobbs Act are not mutually exclusive. *United States v. Kahn*, 472 F. 2d 272, 278 (2d Cir. 1973), *cert. den.*, 411 U.S. 982, 93 Sup. Ct. 2270."

with flashlights and harassed the patrons; they individually "shook down" proprietors often; they set-up under-aged drinkers in bars in order to frame a violation of law; and they sent liquor licensing authorities false reports about bars resulting in cancellations. In short, a set of roving police officers preyed upon the vulnerable position of the bars in the 18th District for their own profit. The proprietors wished to stop this sort of harassment, and the payment of "protection" money appeared to be the only answer. It may be that some of the payments were made from fear of economic harm which does come within the type of coercive extortion prohibited by the first clause of 18 U.S.C. § 1951 (b)(2) and not by the clause relating to extortion "under color of official right".[8] Nevertheless, it was appellants' misuse of the power of their office that triggered the harm as well as the payments in this case and made it the type of extortion charged in the indictment. We must, therefore, reject their contention.

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[8] It may be true that duress is an essential element of a case prosecuted under the provision of the Hobbs Act relating to "wrongful use of actual or threatened force, violence or fear", but coercive extortion is not the only type outlawed by the Act. The other is inducing payoffs "under color of official right"; and that offense does not require proof of coercion. Few cases have dealt with the distinction between these offenses, but several are relevant. *See United States v. Kenny*, 462 F. 2d 1205 (3d Cir.), cert. den., 409 U.S. 914 (1972). *See also United States v. Nardello*, 393 U.S. 286 (1969). (Warren, C.J.) (discussing labels and classification of extortion offenses by the states); *Bianchi v. United States*, 219 F. 2d 182, 193 (8th Cir.), cert. den., 349 U.S. 915 (1955); *United States v. Sutter*, 160 F. 2d 754, 756 (7th Cir. 1947); *United States v. Hyde*, 448 F. 2d 815, 832-4 (5th Cir. 1971), cert. den. 404 U.S. 1058 (1972); *United States v. Pranno*, 385 F. 2d 387, 390 (7th Cir. 1967), cert. den., 390 U.S. 944 (1968); *United States v. De Met*, 486 F. 2d 816, 823 (7th Cir. 1973), (Swygert, C. J., concurring). Here, the Congress intended to and did exercise all of its power under the Constitution, and the Act is to be construed broadly. *United States v. Pranno*, 385 F. 2d at 389. *See Also* Stern, "Prosecutions of Local Political Corruption Under the Hobbs Act: The Unnecessary Distinction Between Bribery and Extortion"; 3 Seton Hall L. Rev. 1 (1971).

CONCLUSION

We have carefully considered the remaining issues raised by appellants regarding admissibility of background, state of mind and other evidence, the prosecutor's closing argument, and the trial judge's sentencing of appellants. We find these claims without merit and therefore affirm the judgment.

AFFIRMED.

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APPENDIX B

- Opinion by Justice Clark -

United States Court of Appeals

FOR THE SEVENTH CIRCUIT

Chicago, Illinois 60604

October 23, 1974

Before

Hon. TOM C. CLARK, Associate Justice, Supreme Court*

Hon. THOMAS E. FAIRCHILD, Circuit Judge

Hon. JOHN PAUL STEVENS, Circuit Judge

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

No. 74-1000 thru 1017, 74-1105 vs.

CLARENCE E. BRAASCH, et al.,
Defendants-Appellants.

Appeal from the United States District Court for the Northern District of Illinois Eastern Division

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Illinois, Eastern Division, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, AFFIRMED, in accordance with the opinion of this Court filed this day.

*Honorable Tom C. Clark, Associate Justice (Retired) of the Supreme Court of the United States, is sitting by designation.

APPENDIX C

United States Court of Appeals

For the Seventh Circuit

Chicago, Illinois 60604

November 21, 1974

Before

Hon. TOM C. CLARK, Associate Justice

Hon. THOMAS E. FAIRCHILD, Circuit Judge

Hon. JOHN PAUL STEVENS, Circuit Judge

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

vs.

CLARENCE E. BRAASCH, et al.,
Defendants-Appellants.

No. 74-1000 thru 74-1017 and 74-1105

Appeal from the Untied States District Court for the Northern District of Illinois, Eastern Divsn.

(72 CR 979)

This matter comes before the court on the five separate petitions for rehearing filed herein by various defendants-appellants. They are:

The "Petition For Rehearing en banc" filed herein on November 5, 1974 by counsel for defendants-appellants, Natale Cale, John Catalano, Edward Finn, Harry Salvesen, Steve Seno and William Swallow;

The "Petition For Rehearing On Behalf Of Appellants Daniel Armstrong, Thomas Batastini, Martin Eshoo, Carl Flagg, Emmons Russell, Joseph Schillinger and Thomas West" filed herein on November 6, 1974;

The "Petition For Rehearing en banc" filed herein on November 6, 1974 by defendant-appellant Edward J. Barry, pro se;

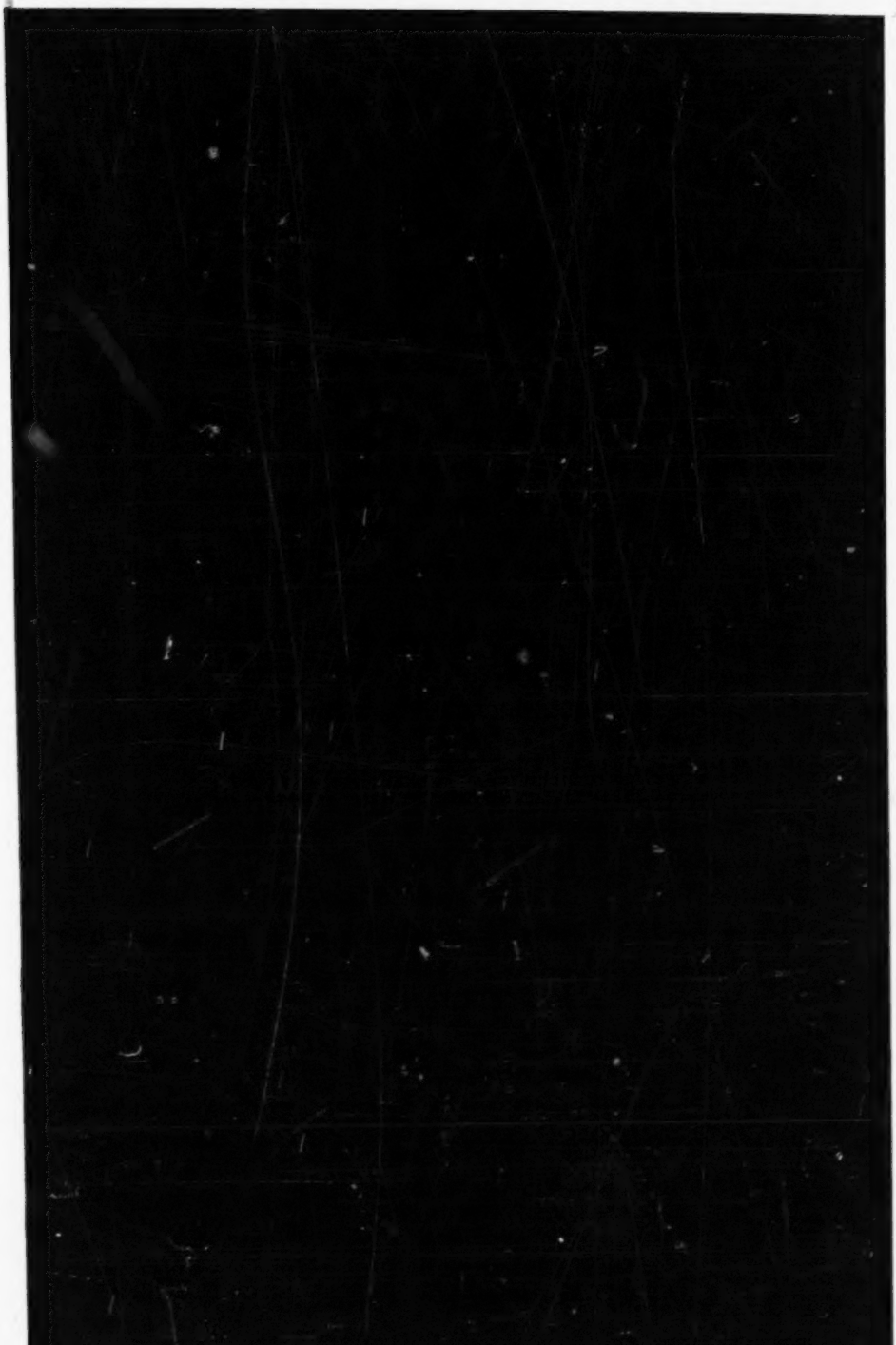
The "Petition For Rehearing In Banc By Defendant-Appellant Clarence E. Braasch" filed herein on November 7, 1974. And

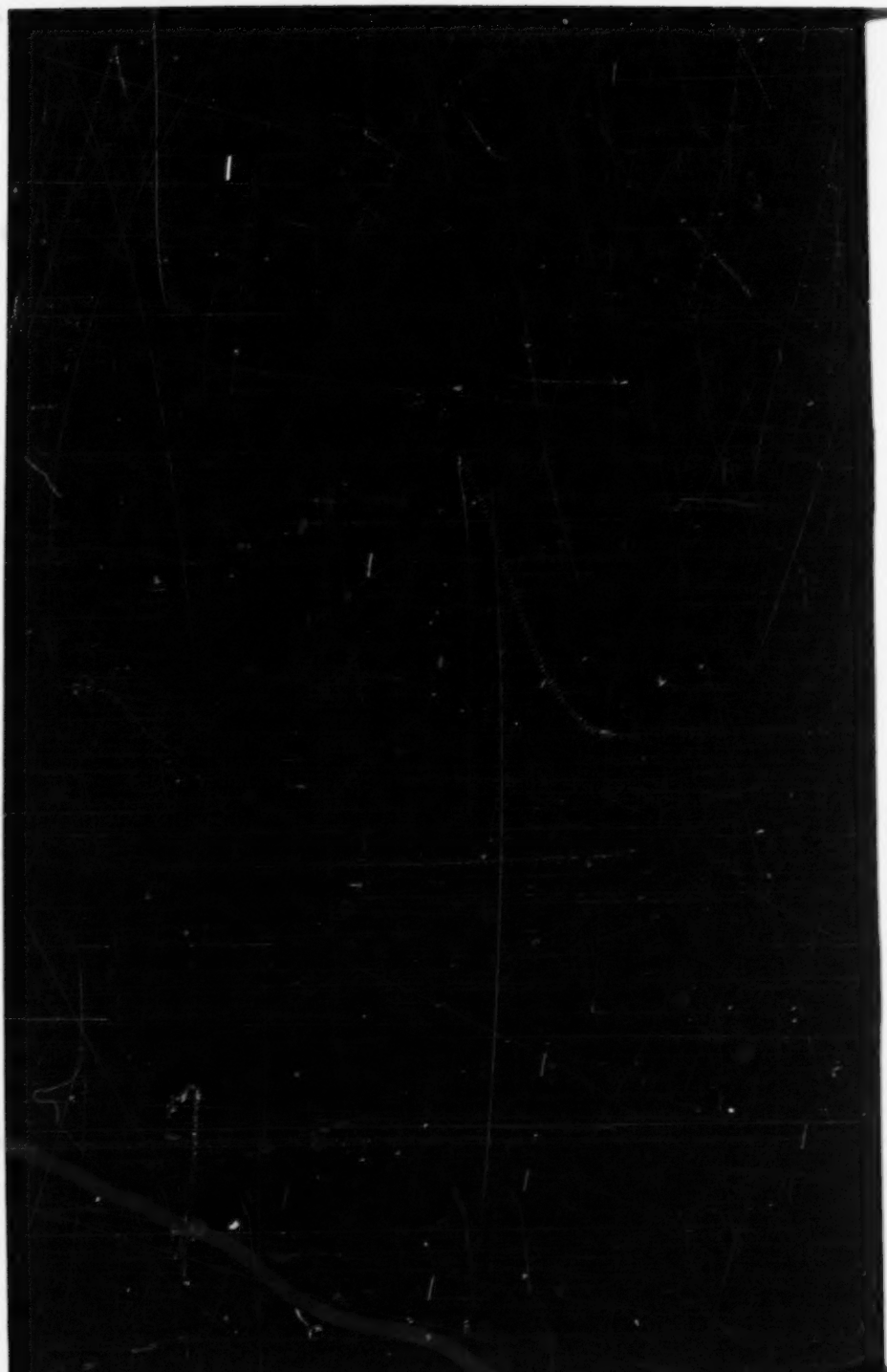
"Petition For Rehearing On Behalf Of Edward McGee, Philip R. Grana, John M. Geraghty And Mike Zakoian", which requests en banc consideration on page eleven thereof, filed herein on November 7, 1974.

No judge in active service has requested a vote thereon, and no judge has voted to grant the suggestion for in banc consideration. All the members of the panel have voted to deny rehearing in each of the aforesaid petitions. On consideration whereof,

IT IS ORDERED that all five of the petitions for rehearing filed herein be, and they are hereby, DENIED.

NOTE: Judge Philip W. Tone disqualified himself from consideration of any of these petitions.





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In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-764

EDWARD BARRY, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

No. 74-781

JOHN M. GERAGHTY, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

No. 74-782

CLARENCE E. BRAASCH, PETITIONER

v.

UNITED STATES OF AMERICA

No. 74-5752

DANIEL ARMSTRONG, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Braasch Pet. App. A)[1] is reported at 505 F.2d 139.

JURISDICTION

The judgment of the court of appeals was entered on October 23, 1974 (Braasch Pet. App. B). Petitions for rehearing *en banc* were denied on November 21, 1974 (Braasch Pet. App. C). The petitions for writs of certiorari were filed on December 19, 1974 (No. 74-764), December 21, 1974 (No. 74-5752), and December 23, 1974 (Nos. 74-781 and 74-782). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether there was an abuse of grand jury process requiring reversal of petitioners' convictions (No. 74-764).

2. Whether it was proper for the trial court to have suppressed orders granting immunity to various government witnesses (No. 74-764).

3. Whether there was a proper joinder of counts and defendants in the indictment (Nos. 74-781, 74-782).

4. Whether police officers who use the power of their official positions to collect monthly payments

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[1] References to the various petitions and their respective appendices will be identified by the lead petitioners named, *e.g.*, "Braasch Pet.", "Braasch Pet. App."

from bar owners may be convicted of extortion "under color of official right" under 18 U.S.C. 1951 (No. 74-764).

5. Whether the admission of evidence of a payoff scheme separate from that charged in the indictment constituted error (Nos. 74-764, 74-781, 74-782).

6. Whether the evidence was sufficient to support petitioner Grana's conviction of perjury (No. 74-781).

7. Whether the prosecutor's closing argument as to petitioner Grana was proper (No. 74-781).

8. Whether the district court abused its discretion in sentencing certain petitioners (No. 74-5752).

STATUTES AND RULES INVOLVED

18 U.S.C. 1623 provides in pertinent part:

> (a) Whoever under oath in any proceeding before or ancillary to any court or grand jury of the United States knowingly makes any false material declaration or makes or uses any other information, including any book, paper, document, record, recording, or other material, knowing the same to contain any false material declaration, shall be fined not more than $10,000 or imprisoned not more than five years, or both.
>
> * * * * *
>
> (c) An indictment or information for violation of this section alleging that, in any proceedings before or ancillary to any court or grand jury of the United States, the defendant under oath has knowingly made two or more declarations, which are inconsistent to the degree that one of

them is necessarily false, need not specify which declaration is false if—

(1) each declaration was material to the point in question, and

(2) each declaration was made within the period of the statute of limitations for the offense charged under this section.

In any prosecution under this section, the falsity of a declaration set forth in the indictment or information shall be established sufficient for conviction by proof that the defendant while under oath made irreconcilably contradictory declarations material to the point in question in any proceeding before or ancillary to any court or grand jury. It shall be a defense to an indictment or information made pursuant to the first sentence of this subsection that the defendant at the time he made each declaration believed the declaration was true.

18 U.S.C. 1951 provides in pertinent part:

(a) Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be fined not more than $10,000 or imprisoned not more than twenty years, or both.

(b) As used in this section—

* * * * *

(2) The term "extortion" means the obtaining of property from another, with his

> consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right.

Rule 8(b) of the Federal Rules of Criminal Procedure provides:

> Two or more defendants may be charged in the same indictment or information if they are alleged to have participated in the same act or transaction or in the same series of acts or transactions constituting an offense or offenses. Such defendants may be charged in one or more counts together or separately and all of the defendants need not be charged in each count.

Rule 14 of the Federal Rules of Criminal Procedure provides in pertinent part:

> If it appears that a defendant or the government is prejudiced by a joinder of offenses or of defendants in an indictment or information or by such joinder for trial together, the court may order an election or separate trials of counts, grant a severance of defendants or provide whatever other relief justice requires. * * *

STATEMENT

On December 29, 1972, twenty-four Chicago police officers were indicted by a federal grand jury in a sixteen-count indictment charging conspiracy to commit extortion, in violation of 18 U.S.C. 1951, and fifteen individual instances of false material declarations to a grand jury, in violation of 18 U.S.C. 1623. Count I alleged that all twenty-four defendants par-

ticipated in an extortion conspiracy to obtain money, under color of official right, from fifty-three retail liquor dealers located within the Eighteenth Chicago Police District. Counts II through XVI charged fifteen of the defendants named in Count I with making false material declarations to a grand jury about their participation in the conspiracy.[2]

Twenty-three defendants went to trial.[3] On October 5, 1973, following a jury trial, petitioners Barry, Cale, Catalano, Finn, McGee, Salvesen, Seno and Zakoian were found guilty of conspiracy as charged in Count I, the only count in which they were named. Petitioners Braasch, Geraghty, Armstrong, Batastini, Eshoo, Flagg, Grana, Russell, Schillinger, Swallow, and West were found guilty of conspiracy as charged in Count I and of false declaration as charged against each in one of the substantive counts. Four defendants were found not guilty of both charges.[4] The court of appeals affirmed (505 F.2d 139; Braasch Pet. App. A).

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[2] Of the twenty-three defendants who stood trial, eight were charged only in Count I, the conspiracy count. These eight were Barry, Cale, Catalano, Finn, McGee, Salvesen, Seno and Zakoian. Each of the other fifteen was charged in Count I and in one of the fifteen individual counts of false declaration.

[3] Defendant Lowell Napier, charged only in Count I, entered a plea of guilty on January 23, 1973.

[4] The following sentences were imposed by the district court:

Defendant	Sentence on Count I	Sentence on False Declaration Count
Clarence E. Braasch	5 years	1 year (consecutive)

The evidence at trial is set forth in Mr. Justice Clark's opinion for a unanimous court of appeals (Braasch Pet. App. A, pp. 2a-8a). It disclosed a wide-ranging extortion conspiracy involving virtually the entire vice squad of the Eighteenth Chicago Police District. Each defendant charged in the indictment was a police officer who, at one time or another, had been assigned to the Eighteenth District; with the

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Defendant	Sentence on Count I	Sentence on False Declaration Count
Edward J. Barry	4 years	—
John M. Geraghty	4 years	1 year (concurrent)
Daniel H. Armstrong	2 years	1 year (consecutive)
Thomas D. Batastini	2 years	1 year (consecutive)
Natale R. Cale	18 months	—
John Catalano	2 years	—
Martin D. Eshoo	2 years	1 year (consecutive)
Edward F. Finn	2 years	—
Carl Flagg	2 years	1 year (consecutive)
Philip R. Grana	18 months	1 year (concurrent)
Edward McGee	18 months	—
Emmons P. Russell	2 years	1 year (consecutive)
Harry R. Salvesen	2 years	—
Joseph A. Schillinger	18 months	1 year (consecutive)
Steve L. Seno	2 years	—
William D. Swallow	18 months	1 year (concurrent)
Thomas D. West	18 months	1 year (consecutive)
Mike Zakoian	18 months	—

Early parole eligibility for Geraghty, Catalano and Seno was afforded by the district court under 18 U.S.C. 4208(a)(2).

exception of petitioner Braasch, each had been assigned to the district's vice squad. At any one time, the vice squad was composed of approximately fifteen officers, who were divided between a day and a night shift. All members of the vice squad were patrolmen except the "vice coordinator," who was a sergeant of police in charge of the entire squad. The vice coordinator was directly responsible to the District Commander, the highest ranking officer in the police district. Among their duties, these vice officers were responsible for the enforcement of liquor laws as they related to the bars and taverns in the Eighteenth District.

Petitioner Braasch was the District Commander from approximately August 1966 to May 1970. From the fall of 1966 until March 1967, his vice coordinator was Robert W. Fischer. Fischer was succeeded in that position by petitioner Barry, who served from approximately April 1967 until August 1970. Barry was then replaced by petitioner Geraghty, who served as vice coordinator until July 1972.

The government presented the testimony of 48 witnesses who were either owners or employees of the 53 liquor establishments from which money was collected. Seven former Chicago police officers, who, at one time or another were assigned to the Eighteenth District vice squad, also testified.[5] These of-

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[5] The former vice squad officers who testified for the government were John A. Cello, Jr., Edward Rifkin, Lowell Napier, Salvatore Mascolino, Robert W. Fischer, Charles DuShane, and Anthony Corsentino.

ficers testified about their involvement in the monthly collection of money from bars in the Eighteenth District and the distribution of that money to members of the vice squad. The group of bars that paid money each month to the vice squad was called "the club" or the "vice club," and the money collected was called the "package" or the "vice package."

The evidence at the seven-week-long trial, which covered 6,836 pages of transcript, established that the monthly collection and distribution of money had existed in the Eighteenth District vice squad since at least 1961. In the middle of 1966, the collections stopped for a period of about six months while Captain James Holzman was District Commander. When Braasch replaced Holzman as District Commander in August 1966, the collections began again, and that event marked the beginning of the conspiracy charged in the indictment.

In the fall of 1966, shortly after Fischer became Braasch's vice coordinator, a gambler by the name of Bill Gold, who represented certain gambling interests and night clubs, contacted Fischer and, through him, offered to pay Braasch a large sum of money each month in order to protect those involved in the night clubs and gambling operations from arrest or harassment by Eighteenth District police officers. Braasch agreed to this arrangement, and this marked the beginning of the so-called "Big Ten" or "Big Club" operation.[6] Fischer and Barry (who succeeded Fisch-

[6] The "Big Club" operation was not alleged in the indictment. Our argument concerning the admissibility of this evidence is discussed at pp. 23-26, *infra*.

er as vice coordinator), served as Braasch's "bagmen" in this operation, by collecting the money and turning it over to him. The money was then distributed among Braasch, his vice coordinator, and certain other designated officers.

Other members of the vice squad, having heard of the "Big Club" operation, approached Fischer to discuss the possibility of resuming the collection of money from bars. Fischer told them he would have to clear it with Braasch. Braasch agreed that the vice men should be allowed to collect money from certain bars because, since he and Fischer had "their own thing going," the vice men should be able "to make a buck for themselves" as well (Braasch Pet. App. A, p. 4a). Braasch and Fischer also decided not to take a cut of the vice club money, since they had "their own thing going" and they should not get too "hungry" (*id.* at 5a). However, Braasch instructed Fischer to obtain a list of the bars from which the vice men planned to collect, so that they could review it to make sure it did not include any of the ten establishments that made up the "Big Club." Such a list was to be prepared each month for Braasch's review.

In November 1966, the vice men began collecting money on a monthly basis from a large number of bars in the Eighteenth District. The bar owners were required to pay $100 per month to the vice squad. In return, they were to be free from harassment by members of the squad and were not to be subjected to "shakedowns" by individual vice squad members. The

amount to be collected and the procedures to be followed as new bars were added to the list were more specifically determined at a meeting of the vice squad held in late 1966 or early 1967.

The required list was prepared each month and given to Fischer, who presented it to Braasch for his review. Occasionally Braasch crossed off the names of bars from which he did not want the vice men collecting. After Barry replaced Fischer as vice coordinator, he assumed the monthly duty of taking the list to Braasch.

The money that was collected from the bars was distributed among the members of the vice squad by officers Cello, Rifkin, Mascolino and Napier. The amounts received each month ranged from $150 to $500 per man.

In August 1970, shortly after Braasch had completed his tour as District Commander, petitioner Geraghty replaced Barry as vice coordinator. After he assumed that position he instructed vice officers Rifkin and Mascolino to collect the money from the bars each month and deliver it directly to him. Thereafter, Geraghty assumed the monthly responsibility of personally distributing the money to the vice officers.

Subsequently, fifteen of the petitioners appeared before the grand jury and, in substance, denied participation in the extortion scheme.

ARGUMENT

1. Petitioners in No. 74-764 contend that the government abused the process of the grand jury by using grand jury subpoenas to summon certain bar owners before a grand jury after the return of the indictment in the instant case; the owners thereupon invoked their privilege against self-incrimination and were excused. Petitioners claim that the government later used the existence of these grand jury subpoenas to coerce the subsequent appearance of these witnesses in the federal building, not for the purpose of appearing before the grand jury but for the sole purpose of granting them immunity to compel their testimony at petitioners' trial in this case. The record, however, refutes this contention.

The record demonstrates that the grand jury continued its investigation of police corruption in the Eighteenth District after it returned the indictment in the instant case on December 29, 1972. The need for the continuation of this investigation is reflected by evidence presented during the course of trial, which established that corruption among police officers in the Eighteenth District was not limited to the plainclothes vice officers indicted in this case, but extended to uniformed policemen also assigned to that district (Tr. 980-983). This continuing investigation resulted in another indictment, returned on May 31, 1973, charging six uniformed Eighteenth District police officers with extortion from nine of the bar

owners named in the instant indictment as victims.[7] As Mr. Justice Clark said in his opinion for the court below (Braasch Pet. App. A, pp. 11a-12a):

> Appellants next complain that the Government abused the grand jury process by calling prospective witnesses before the Grand Jury for the purpose of preparing an already pending indictment for trial. The short answer is that the Government has every right to interrogate witnesses on subjects relevant to a continuing grand jury investigation even when the evidence received may also relate to a pending indictment. *Beverly* v. *United States*, 468 F. 2d 732, 742 (5th Cir. 1972). Appellants have shown no prejudice from these occurrences and their contention must fail. *United States* v. *Star*, 470 F. 2d 1214, 1217 (9th Cir. 1972).

Nor would it have been necessary for the government to use grand jury subpoenas for the purpose alleged. Regular trial subpoenas could and would have been used, if necessary, to obtain the appearance of witnesses before the court in order to be granted immunity. There is no indication that the witnesses felt "coerced" into appearing merely because they had previously been subpoenaed by the grand jury. Moreover, the granting of immunity prior to trial was proper both legally (18 U.S.C. 6003), in light of the likelihood that the witnesses would invoke the Fifth Amendment, and from the standpoint of the conser-

[7] This second indictment was No. 73 CR 401 in the United States District Court for the Northern District of Illinois, Eastern Division.

vation of judicial time. To have waited to seek immunity until the Fifth Amendment was invoked at trial would have created significant delays.

In light of all of the circumstances, we submit that the prosecutors followed proper and legitimate procedures and did not misuse the grand jury process. See *Beverly* v. *United States*, 468 F.2d 732, 743 (C.A. 5); *United States* v. *Dardi*, 330 F.2d 316, 336 (C.A. 2), certiorari denied, 379 U.S. 845. In any event, petitioners have not indicated how, even if there were an improper use of the grand jury, they were prejudiced thereby. See *United States* v. *Star*, 470 F.2d 1214, 1217 (C.A. 9); *United States* v. *Fisher*, 455 F.2d 1101, 1104-1105 (C.A. 2). As these witnesses possessed relevant evidence, the government was entitled to seek immunity for them, and their presence could have been compelled if they had refused to appear otherwise. Cf. *United States* v. *Fisher*, *supra*. While the witnesses might have remedies to rectify any irregularities in obtaining their testimony, such irregularities relate to matters personal to the witnesses about which petitioners have no standing to complain.

2. At the time the immunity orders were entered, the government's petitions, supporting papers, and the orders themselves were "suppressed" (*i.e.*, placed under seal). The defendants were not notified that immunity had been granted to the various bar owners, and their pre-trial motion asking the district court to rescind its suppression order was denied. As noted above, the government chose to grant these

witnesses trial immunity prior to trial in order to avoid the inevitable long and unnecessary delays that would occur during the course of the trial if the court were required to interrupt the presentation of evidence fifty or more times to grant a witness immunity. Petitioners in No. 74-764 contend that the suppression of the immunity orders denied them their Sixth Amendment right to the effective assistance of counsel.

This contention must fail because, as the court of appeals correctly held (Braasch Pet. App. A, pp. 10a-11a), the petitioners lack standing to contest the propriety of the immunity orders. See *United States* v. *Lewis*, 456 F.2d 404, 409-410 (C.A. 3); *Lopez* v. *Burke*, 413 F.2d 992, 994 (C.A. 7). It is the immunized witness whose rights are involved, and it is only he who can challenge the granting of immunity.

While petitioners' lack of standing may not, in and of itself, dispose of the precise issue of the propriety of the suppression of the immunity orders, it does provide the basic rationale for the court of appeals' holding. As the court held (Braasch Pet. App. A, p. 11a):

> The suppression orders were entered by Chief Judge Edwin A. Robson in March of 1973, "[i]n order to encourage further disclosures and in order to protect the personal safety and security of the informers and potential witnesses by concealing their identity." Since, as we have said, a defendant has no standing to contest the propriety of a grant of immunity, it follows that appellants had no right to be present at the im-

> munity hearings nor any right to obtain the identity of Government witnesses by or through being furnished copies of the orders granting immunity. Chief Judge Robson denied appellants' motions to lift the suppression order and we agree with his conclusion on the matter. It also follows that defense counsel had no right to be at the immunity hearings.

As the court of appeals recognized, petitioners' lack of standing to challenge the immunity orders rebuts their contention that their attorneys had any right to be present at the hearing or even to be notified of it. And, in reality, their presence would have been of no benefit to petitioners. Once the statutory requirements of 18 U.S.C. 6003 are complied with by the government, there exists no discretion on the part of the court to deny the request for immunity. *Ullmann* v. *United States*, 350 U.S. 422, 432-434; *United States* v. *Wilcox*, 450 F.2d 1131, 1138, n. 9 (C.A. 5), certiorari denied, 405 U.S. 917; *Licata* v. *United States*, 429 F.2d 1177, 1179 (C.A. 9), vacated on other grounds, 400 U.S. 938; *Ellis* v. *United States*, 416 F.2d 791, 796-797 (C.A.D.C.). Thus, petitioners' attorneys would have served no legitimate function at such a hearing and would simply have learned the names of some of the potential government witnesses, information to which a defendant in a non-capital criminal case is not entitled. See, *e.g.*, *United States* v. *Addonizio*, 451 F.2d 49, 64 (C.A. 3), certiorari denied, 405 U.S. 936; *United States* v. *Conder*, 423 F.2d 904, 910 (C.A. 6); *Rosenzweig* v.

United States, 412 F.2d 844, 845 (C.A. 9); *United States* v. *Persico*, 425 F.2d 1375, 1378 (C.A. 2), certiorari denied, 400 U.S. 869. Compare 18 U.S.C. 3432.

In light of the valid reason underlying the suppression of the immunity orders—concern for the personal safety of the witnesses (*United States* v. *Persico*, *supra*, 425 F.2d at 1383)—and in the absence of demonstrated prejudice to petitioners, there exists no reversible error in this respect.[8]

3. Petitioners Braasch (No. 74-782), Grana and Geraghty (No. 74-781) argue that they were prejudiced by the joinder of the conspiracy count against them with other counts charging them with perjury. Petitioners Grana, Geraghty, McGee, and Zakoian (No. 74-781) argue that they were prejudiced by the joinder of the conspiracy count against each of them with all other defendants' perjury counts—McGee and Zakoian because they were not charged with perjury at all, and Grana and Geraghty because there was no allegation of a common plan to give false testimony and because the trial jury would naturally "infer that because a Grand Jury believed that fifteen officers lied about receiving money there must

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[8] Petitioners were not prejudiced by the suppression of the immunity orders. Before any of the immunized tavern owners testified, each defense counsel was given a sample copy of the immunity order entered with respect to each witness (Tr. 501-502). Since petitioners were fully apprised of the existence and the extent of the immunity orders before any tavern owner testified, the potential impeachment value of such orders was preserved for them.

therefore be some substance to the conspiracy count which charged them all with receiving the money" (Geraghty Pet. 9). Petitioner Braasch, alleging prejudicial joinder of defendants, makes a similar argument. He contends (Braasch Pet. 23-24) that he was prejudiced by being joined for trial with fourteen "accomplices" who had been charged with perjury and thus were not to be believed, while the witnesses against him were "accomplices" not charged with perjury and thus, by inference, were credible.

Under Rule 8(b), Fed. R. Crim. P., offenses arising out of the "same series of acts or transactions" may be joined together in a single indictment. Even dissimilar acts, such as conspiracy to commit extortion and perjury, may be joined against multiple defendants if they arise out of the "same series of acts or transactions." See, *e.g.*, *United States* v. *Friedman*, 445 F. 2d 1076, 1082-1083 (C.A. 9). Thus, where a perjury count relates to false testimony before the grand jury investigating the subject matter that results in the main charge, joinder is permissible. See *United States* v. *Jones*, 374 F. 2d 414 (C.A. 2); *United States* v. *Verra*, 203 F. Supp. 87, 90 (S.D. N.Y.). Here, the nexus between the conspiracy and false declaration counts was sufficiently close to be deemed a "series of acts" under Rule 8(b), and joinder was therefore proper. See, *e.g.*, *United States* v. *Gill*, 490 F. 2d 233, 238-239 (C.A. 7), certiorari denied, 417 U.S. 968.

Nor is there merit to petitioners' contention that a severance should have been granted under Rule

14, Fed. R. Crim. P. They suggest that it is inherently prejudicial to join a false declaration count with a count charging the substantive crime that is being investigated during the questioning that led to the alleged false statements and that the petit jury's decision on the extortion charge necessarily was influenced by its realization, induced by the presence of the false declaration count, that the grand jury had heard petitioners testify on the matter and did not believe them or their co-defendants.

However, the possibility that a petit jury may be influenced in an improper manner by the conclusion of the grand jury to indict a defendant is inherent in every case proceeded upon by indictment. The question is whether this acceptable, unavoidable consequence of the grand jury system is somehow so exacerbated by the joinder of a false declaration charge as to create a real and serious danger of impropriety sufficiently grave that the normal interest in efficient disposition of criminal charges by joinder of charges arising out of the "same series of acts or transactions" and involving the presentation of some of the same evidence is overbalanced thereby. The Seventh Circuit, sitting *en banc*, recently answered that precise question in *United States* v. *Pacente*, 503 F.2d 543, 547, certiorari denied, December 9, 1974, No. 74-243:

> * * * [I]t is the judgment of a majority of this court that it is an unwarranted over-refinement to speculate that * * * [there is] a significant danger that the trial jurors, acting to-

> gether, will give weight to the conclusion reached by the grand jurors and fail to decide the issues of fact according to their own proper evaluation of the evidence.

Accordingly, we submit that it was not improper in the circumstances of this case for the trial court to have refused to sever either counts or defendants. See *United States* v. *Gill*, *supra*, 490 F.2d at 239; *United States* v. *Verra*, *supra*, 203 F. Supp. at 90-91; *United States* v. *Haim*, 218 F. Supp. 922, 932 (S.D. N.Y.).

Moreover, as the court of appeals pointed out, the trial court gave careful instructions admonishing the jury that each count and each defendant was to be given separate consideration (Braasch Pet. App. A, p. 17a):

> Moreover in the instant case, the trial judge in his charge specifically instructed the jury to give separate consideration to each count and to render separate verdicts on each defendant. The charge admonished the jury further that each defendant was entitled to have his guilt or innocence determined from his own conduct and from the evidence as applied to him as if he were being tried alone and that the guilt or innocence of any one defendant should not influence the jury's verdict respecting the others. Further, with regard to the perjury counts, the charge instructed that testimony introduced as to them was to be considered only as evidence of the false material declaration charge and that the jury should not consider that testimony as evidence of any defendant's guilt as to Count One of the indictment. The fact that the jury found

> four of the defendants not guilty on both the conspiracy and the respective perjury counts showed that they not only knew what they were doing but did what they intended. * * * We add that the massive duplication of effort entailed in separate trials is not justified absent a more specific claim of prejudice than the one now urged by appellants.

As this Court has noted: "Our theory of trial relies upon the ability of a jury to follow instructions." *Opper* v. *United States*, 348 U.S. 84, 95. There is no showing that the theory lacks validity in the circumstances of this case.

In sum, the grant or denial of a severance under Rule 14 is within the sound discretion of the district court, and its decision will not be reversed absent an abuse of discretion. *Opper* v. *United States*, *supra*, 348 U.S. at 95; *United States* v. *Pacente*, *supra*, 503 F.2d at 546; *United States* v. *Gill*, *supra*, 490 F.2d at 239; *United States* v. *Hutul*, 416 F.2d 607, 621 (C.A. 7), certiorari denied, 396 U.S. 1012. The court of appeals found no such abuse, and there is, we submit, no reason for further review of that determination.

4. Petitioners in No. 74-764 argue that while the indictment charged extortion "under color of official right," the evidence showed only extortion through fear of economic harm and, hence, there was a fatal variance between the crime charged and the proof. Petitioners place an unwarranted and unduly narrow interpretation—one unintended by Congress—upon the phrase "under color of official right" as used in

18 U.S.C. 1951. The court of appeals correctly held that petitioners' actions here were clearly of the type prohibited by the statute as extortion "under color of official right" (Braasch Pet. App. A, p. 19a):

> Appellants, however, overlook the fact that the evidence shows that the conspirators used the power and authority vested in them by reason of their office to obtain money not due them or due the office. The use of office to obtain payments is the crux of the statutory requirement of "under color of official right", and appellants' wrongful use of official power was obviously the basis of this extortion. See *United States* v. *Staszcuk*, [502 F.2d 875 (C.A. 7)]. It matters not whether the public official induces payments to perform his duties or not to perform his duties, or even, as here, to perform or not to perform acts unrelated to his duties *which can only be undertaken because of his official position.* So long as the motivation for the payment focuses on the recipient's office, the conduct falls within the ambit of 18 U.S.C. § 1951. That such conduct may also constitute "classic bribery" is not a relevant consideration. [Emphasis supplied.]

In effect, it is an official's suspension of independent judgment and impartial determination on the merits of each case, in return for payments of money, which is made unlawful by this portion of Section 1951. *United States* v. *Staszcuk*, 502 F.2d 875 (C.A. 7); *United States* v. *Hyde*, 448 F.2d 815 (C.A. 5), certiorari denied, 404 U.S. 1058. Thus, when an official coerces one to pay in order to prevent that offi-

cial from performing a legal duty, he has committed extortion under color of official right. *United States* v. *Hyde, supra*, 448 F.2d at 832-833. As the court of appeals said here (Braasch Pet. App. A, p. 20a): "[I]t was appellants' misuse of power of their office that triggered the harm as well as the payments in this case and made it the type of extortion charged in the indictment." Cf. *United States* v. *Classic*, 313 U.S. 299, 326; *United States* v. *Senak*, 477 F.2d 304, 306-307 (C.A. 7), certiorari denied, 414 U.S. 856.

5. Evidence of a conspiracy not charged in the instant indictment—the so-called "Big Club" conspiracy—was admitted to show the motives of petitioners Braasch and Barry for participating, without financial gain, in the "vice club" conspiracy charged in the indictment. Petitioner Braasch (No. 74-782) contends that the introduction of this evidence was erroneous as to him in three respects: (1) its prejudicial impact outweighed its probative value in light of the amount of "Big Club" evidence introduced (in this contention he is joined by petitioner Barry (No. 74-764)); (2) he was denied his right to be tried on the "Big Club" conspiracy only pursuant to an indictment; and (3) he was denied due process and notice of the nature of the charges against him. Petitioners Geraghty, Grana, McGee and Zakoian (No. 74-781) also contend that they were prejudiced by this evidence introduced against Braasch and Barry.

On this issue, we rely primarily upon the opinion of the court of appeals (Braasch Pet. App. A, pp.

14a-16a). Briefly, the court first recognized the established principle that evidence of "other crimes" is admissible to prove motive and intent and that the trial court is given wide discretion in balancing the probative value of such evidence against its prejudicial impact. In light of the crucial importance in this case of proving motive as to Braasch and Barry (*i.e.*, their desire to protect their "Big Club" operation), the trial court correctly decided that the scales tipped in favor of admissibility of the evidence as to Braasch and Barry. Indeed, the evidence that was admitted concerning the "Big Club" was not so excessively detailed as to create a "trial within a trial" [9] and was sufficiently plain, clear and conclusive that its probative value outweighed potential prejudice. See *United States* v. *Broadway*, 477 F.2d 991, 994-995 (C.A. 5); *United States* v. *Spica*, 413 F.2d 129, 131 (C.A. 8).

Nor was Braasch denied his right to be tried upon the charges alleged in the indictment. There was no way to try the case without introducing some evidence about the "Big Club," since those payoffs were intertwined with the others. Moreover, on three occasions the trial judge gave careful limiting instructions concerning the narrow purpose for which the jury was to consider this evidence (Tr. 4682-4684, 5261-5263, 7556-7559). It is not to be assumed that the jury disregarded these instructions. *Opper* v.

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[9] The other crimes evidence came mostly from government witness Robert Fischer—only one of over fifty government witnesses.

United States, supra. As Mr. Justice Clark said in his opinion for the court below (Braasch Pet. App. A, p. 16a):

> True it is that detailed evidence as to a similar, contemporaneous conspiracy has a potentially prejudicial effect, but here that effect was outweighed by the importance of this motive evidence as well as the District Court's cautious and thorough limiting instructions which were delivered to the jury not only at the conclusion of witness Fischer's direct examination but again after witnesses Cello and Murphy testified briefly as to their involvement in the "big club", and for a third time in the final charge to the jury. These instructions specified that the "big club" evidence was not to be used against any other of the defendants besides Braasch and Barry, and as to them it was only to be considered as it relates to their motive and intent to participate in the "little club" conspiracy charged in the indictment. We have no reason to doubt the effectiveness of these carefully drawn instructions. *See United States* v. *Pauldino*, 443 F. 2d 1108, 1114 (10th Cir.), cert. denied, 404 U.S. 882 (1971). The jury verdict—in which four of the twenty three defendants were acquitted —itself supports this conclusion.

Finally, Braasch claims that he was not given adequate notice that the government intended to introduce this evidence. The record, however, does not support this claim. Sixteen days prior to the time that Braasch's lawyer began his cross-examination of Fischer, government counsel informed him of their

intention to introduce evidence on the subject of motive, through Fischer's testimony, as to Braasch's involvement in uncharged criminal conduct. At that time, the government set forth the general nature of Fischer's prospective testimony with respect to the "Big Club" scheme (Tr. 2352-2358). Thus, as the court below noted (Braasch Pet. App. A, p. 16a), petitioner Braasch "had both notice and opportunity to meet the Government's proof of concurrent criminal conduct."

The contention raised by the petitioners against whom the "Big Club" evidence was not admitted is likewise unpersuasive. In a joint trial, evidence as to other crimes may be admitted against some defendants but not others, so long as the jury is properly instructed concerning the parties against whom the evidence may be admitted, as it was here. See *United States* v. *Pauldino*, 443 F.2d 1108, 1114 (C.A. 10), certiorari denied, 404 U.S. 882; *Oden* v. *United States*, 410 F.2d 103, 104 (C.A. 5), certiorari denied, 396 U.S. 863. Thus, as the court of appeals noted (Braasch Pet. App. A, p. 16a), the most important element militating against petitioners' contention is the fact that the trial judge's limiting instruction regarding the "Big Club" evidence was read to the jury no fewer than three times (Tr. 4682-4684; 5261-5263; 7556-7559).

6. Count VII alleged, in substance, that petitioner Grana (No. 74-781) made the following false declarations when he testified before a federal grand jury: (1) he had never received any money from

another Chicago police officer, knowing that the money originated with a bar or tavern; (2) while employed as a Chicago police officer in the Eighteenth District, he had no knowledge that certain members of the District vice squad were collecting money from bars or taverns; and (3) he had no knowledge that this money was then being divided among other members of the Eighteenth District vice squad.

Petitioner Grana, relying on this Court's opinion in *Bronston* v. *United States*, 409 U.S. 352, contends that he was wrongly convicted under 18 U.S.C. 1623 because his answer to one of the questions which formed the basis of the false declaration charge was "literally true" (Geraghty Pet. 13) since the proof showed that only *some* of the members of the vice squad had divided the pay-offs and his negative response was to a question covering *all* of the members of the vice-squad.[10]

However, even if petitioner is accurate in characterizing his response to this question as "literally true," his conviction for false declaration was proper nevertheless; for it was only necessary for the jury to find that any one of the three alleged false material declarations charged was proved beyond a reasonable doubt (see *United States* v. *Pollack*, 474 F.2d 828, 831 (C.A. 2)), and the jury was so instructed

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[10] The question asked and Grana's answer were as follows (Grana Grand Jury Tr. 10; Gov't. Exh. 74, p. 10):

> Q. Sir, when you were in the 18th District, were you aware that at that time certain members of the vice squad were collecting money from various taverns

(Tr. 7553-7554). While two of the alleged false declarations—that he had no knowledge that certain officers were collecting money and that the money collected was being divided among members of the vice squad—were in response to a compound question (see note 10, *supra*) to which petitioner's response may have been "literally true," there was more than sufficient evidence to support a finding that petitioner lied about his own receipt of money from another police officer.[11]

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and bars; and—that the money was being split between all members of the vice squad?

A. No, sir, I was not.

[11] The series of questions asked and Grana's responses were as follows (Grana Grand Jury Tr. 6-7; Gov't. Exh. 74, pp. 6-7):

Q. Sir, while you were assigned to the 18th Police District did you ever ask for money from any bar owner or tavern owner or other businessman while performing your duties as a Chicago Police Officer?

A. No, Sir. I did not.

I wasn't working on a bar detail.

Q. Sir, while you were employed in the 18th District, did you ever receive any money from any bar owner or tavern owner or other businessman—

A. No. Sir.

Q. —while performing your duties as a Chicago Police Officer?

A. No, sir.

Q. Sir, while you were assigned to the 18th Police District, did you ever receive any money from any other Chicago Police Officer?

A. Just a contingency money, or the informant money.

Q. Excluding the contingency money, and excluding any repayment of personal loans that you may have loaned to a friend at the Chicago Police Department in the 18th District,

Indeed, Grana's conviction of conspiracy to commit extortion makes clear that the jury must also have concluded that his grand jury testimony, that he never received money from any bar owner was false. The fact that the jury found beyond a reasonable doubt that Grana had participated in a conspiracy to extort money from the tavern owners necessarily meant that it found that he lied to the grand jury when asked about that very matter.[12] Thus, even if it also concluded that he also made the two "literally true" false declarations, the conviction of false declaration can stand.

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excluding those two, have you ever received any money from any other policeman?

A. No, sir.

Q. Specifically, sir, while assigned to the 18th District, have you ever received any money from any other Chicago Policeman knowing that money originated with a bar owner or tavern owner or another businessman?

A. No, sir, I did not.

[12] The evidence in respect to both counts came largely from Edward Rifkin, an unindicted co-conspirator. It showed that Grana was a partner of Rifkin, one of the "vice club" collectors (Tr. 1282). After joining the Eighteenth District vice squad, Grana received his share of the "vice package" each month from Rifkin for a period of several months, until petitioner Geraghty became the vice coordinator and took over the responsibility of distributing the "package" (Tr. 1372-1373.) Grana accompanied Rifkin to the bars from which Rifkin was obtaining money on a monthly basis (Tr. 1282), but he was not physically present when the monthly payment was given to Rifkin by the bar owners (Tr. 1442). Moreover, Sal Strazzante, an employee of the King's Ransom, testified that, after Rifkin discontinued collecting the monthly payment from the King's Ransom, a vice officer who identified himself

In any event, petitioner Grana's one-year sentence on the false declaration count was made concurrent with his 18-month sentence on the conspiracy count. Accordingly, it is unnecessary for this Court to consider his challenge to the conviction on the false declaration count. *Barnes* v. *United States*, 412 U.S. 837, 848 and n. 16.

7. Government witness Salvatore Strazzante testified that he made monthly payments of money to vice officer Rifkin until late 1971 (Tr. 4154). He further testified that after Rifkin discontinued collecting his monthly payment, he began making the payments to a vice officer named Grana (Tr. 4154-4157). However, when asked if he saw that officer in the courtroom, he identified petitioner Schillinger (Tr. 4157-4158). It was stipulated that Schillinger could not have received these particular payments (Tr. 4166).

During closing argument, government counsel asked the jury to notice the similarities between the appearances of Grana and Schillinger and infer that the witness had made an honest mistake in his identification (Tr. 7048). This argument was not improper, as petitioner Grana contends, for it merely sought to remind the jury of evidence that had been

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as Grana began making this monthly collection of money from the King's Ransom (Tr. 4154-4157). While Strazzante was unable to identify Grana as the vice officer to whom he made these payments (Tr. 4157-4158), there was a strong inference that the officer who identified himself to Strazzante as vice officer Grana was in fact the defendant Grana (Tr. 7047-7050). See pp. 30-31, *infra*.

produced and to persuade its members to draw legitimate, relevant inferences therefrom. *United States* v. *Fidanzi*, 411 F.2d 1361, 1362 (C.A. 7), certiorari denied, 396 U.S. 929. Calling to the jury's attention the physical characteristics of certain defendants on the issue of identification is not improper, so long as the matters of identification adverted to are before the jury and not uniquely within the prosecutor's knowledge. See *United States* v. *Borelli*, 435 F.2d 500, 503 (C.A. 2), certiorari denied, 401 U.S. 946; *Hayes* v. *United States*, 368 F.2d 814, 815 (C.A. 9). In sum, the prosecutor in his argument only presented what the ~~jury~~ jurors could reasonably have inferred from all the evidence and from their own observations. Cf. *United States* v. *Lawson*, 483 F.2d 535, 539 (C.A. 8), certiorari denied, 414 U.S. 1133.

8. Petitioners Armstrong, Batastini, Eshoo, Flagg, Russell, Schillinger and West (No. 74-5752) contend that the district court abused its discretion in imposing consecutive sentences upon them on the conspiracy and false declaration counts. They assert that their consecutive sentences were a result of the fact that they testified at trial, whereas other defendants who did not testify received concurrent terms on the conspiracy and false declaration convictions.

It is established that the district court has wide discretion to determine the appropriate sentence to be imposed. *United States* v. *Tucker*, 404 U.S. 443, 446-447. When the sentence imposed is within the statutory limits it is generally not subject to review absent exceptional circumstances, such as a proced-

ural irregularity or consideration by the sentencing court of illegitimate or irrelevant matters. See *United States* v. *Tucker*, *supra*; *Gore* v. *United States*, 357 U.S. 386, 393; *United States* v. *Grene*, 455 F.2d 376, 377 (C.A. 5), certiorari denied, 409 U.S. 856; *United States* v. *Gill*, *supra*, 490 F.2d at 241. In the instant case, there has been no showing of any such exceptional circumstance. There has been no affirmative showing that the sentencing judge has a policy of enhancing punishment because a defendant testifies at trial, nor has there been a showing that this was even a consideration in this particular case. The sentences were within the statutory maximum and were not shown to be the product of improper considerations; they thus constituted a proper exercise of the trial court's discretion.[13]

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[13] Even if one were to speculate that the district judge imposed consecutive sentences on those petitioners who testified at trial merely because they so testified, there is respectable authority supporting such an action—if he believed that they testified falsely. The Fourth, Sixth and Ninth Circuits have approved the practice of relying upon false trial testimony to enhance sentence. See *United States* v. *Moore*, 484 F.2d 1284, 1287-1288 (C.A. 4); *United States* v. *Wallace*, 418 F.2d 876 (C.A. 6); *United States* v. *Cluchette*, 465 F.2d 749, 754 (C.A. 9). Compare *United States* v. *Phillips*, C.A. 6, No. 74-1216, decided February 11, 1975, in which the sentencing judge imposed the maximum sentence on the stated ground that he believed the defendant had perjured himself, which the court of appeals found impermissible; the court did not even mention its earlier decision in *Wallace*. The rule that a sentencing court may consider the defendant's credibility as a witness has been rejected by the District of Columbia Cir-

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petitions for writs of certiorari should be denied.

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cuit. See *Scott* v. *United States*, 419 F.2d 264, 268 (C.A.D.C.). However, the instant case is not an appropriate case in which to resolve the conflict, because here, as we have noted, there has been no affirmative showing, only speculation, that the sentencing judge increased the sentence imposed because of his belief that petitioners testified falsely or because they testified at all. In all of the decided cases, on the other hand, the judge has expressly identified for the record the basis for his increased sentence.

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